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information

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Summary

P. BERRY, COMPLAINANT, AND CANADA POST CORPORATION RESPONDENT EMPLOYER. COMPLAINT OF UNFAIR LABOUR PRACTICE (SECTION 147(a)) OF THE CANADA LABOUR CODE (PART II - OCCUPATIONAL SAFETY AND HEALTH). DISMISSED.

Board File: 950-145

Decision no.: 837

Résumé

P. BERRY, PLAIGNANT, ET SOCIÉTÉ CANADIENNE DES POSTES, EMPLOYEUR INTIMÉ. PLAINTE DE PRATIQUE DÉLOYALE (PARAGRAPHE 147a)) DU CODE CANADIEN DU TRAVAIL (PARTIE II - SANTÉ ET SÉCURITÉ AU TRAVAIL). REJETÉE.

Dossier du Conseil: 950-145

No de décision: 837

The complainant alleged that Canada Post Corporation had contravened section 147(a) of the Canada Labour Code, Part II by taking disciplinary action against him for refusing a work assignment that he believed to be unsafe as he was without proper footwear. Mr. Berry received a 15-day suspension without pay for his action, which he deemed to be in accordance with sections 128 and 129 of the Code.

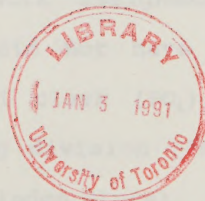
The evidence revealed that the employer had reasonable grounds to believe that the complainant was not motivated by genuine safety reasons when he refused to go and dump mail in a safety footwear designated area of the plant.

The Board dismisses the complaint. The basic issue behind the refusal relates to the proper designation of volunteers for work in the dumping area. The Board suggests that the employer and the safety and health committee turn their mind to the matter.

Le plaignant prétend que l'employeur a enfreint le paragraphe 147a) du Code en lui imposant des mesures disciplinaires pour avoir refusé d'exécuter une tâche qu'il jugeait dangereuse sans des chaussures de sécurité appropriées. M. Berry a été suspendu pour 15 jours alors qu'il estimait agir en conformité avec les articles 128 et 129 du Code.

La preuve a révélé que l'employeur avait des motifs raisonnables de croire que le plaignant n'avait pas agi pour des motifs de sécurité lorsqu'il a refusé de déverser des sacs de courrier dans un secteur où le port de chaussures sécuritaires est obligatoire.

Le Conseil rejette la plainte. La vraie question en cause touche l'affectation des volontaires à ces tâches où le port des chaussures est requis. Le Conseil suggère à l'employeur et au comité de santé et de sécurité d'examiner la question.



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Relations du
Travail

Reasons for decision

Patrick Berry,

complainant,

on his behalf, the Canadian
Union of Postal Workers,

and

Canada Post Corporation,

respondent employer.

Board File: 950-145

The Board consisted of Mr. François Bastien, Member, sitting as a single-member panel pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. R. Aaron Rubinoff, assisted by Mr. Marc Béland, for the complainant; and

Mr. Phillip M. Dempsey, assisted by Mrs. Ginette Denis, for the Canada Post Corporation.

I

This complaint dated April 3, 1990 was filed with the Board on April 5, 1990 pursuant to section 133 of the Canada Labour Code (Part II - Occupational Safety and Health). The complainant alleged that the Canada Post Corporation (Canada Post or the employer) had contravened section 147(a) of the Code by taking disciplinary action against him for refusing a work assignment that he believed to be unsafe as he did not have the proper footwear. Mr. Berry, a postal clerk (PO₄), currently works in the machine processing division (DMPP) of the Ottawa mail processing plant (Caledon Place). He received a 15-day suspension without pay for his refusal, which, he maintained, was in accordance with sections 128 and 129 of the Code.

The relevant provisions of the Code are the following:

"126.(1) While at work, every employee shall

(a) use such safety materials, equipment, devices and clothing as are intended for the employee's protection and furnished to the employee by the employer or as are prescribed;

(b) follow prescribed procedures with respect to the safety and health of employees;

...

128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee, the employee may refuse to use or operate the machine or thing or to work in that place.

...

133.(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.

...

147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part;..."

The employer submitted that the complainant did not have reasonable cause to believe that a danger existed, and

further had not invoked section 128(1) in good faith. It contends that Mr. Berry engaged in unjustified insubordination as he attempted to disrupt the normal and legitimate assignment of work. His refusal to work was not motivated by genuine safety reasons. Instead, the complainant himself neglected his own duties and obligations under sections 126(a) and (b) of the Code, with respect to wearing footwear purchased by the employer and intended for the employee's protection.

The complaint was heard at Ottawa on September 18 and 28, 1990.

II

Part of the activities of the Ottawa mail processing plant at Caledon Place involves the handling and dumping of mail from a designated area referred to as glacis no. 4. The setting features a giant slide fed by a conveyor belt that runs across one section of the building. Operations are performed from two sides of the glacis depending on the type of mail: the street letter bulk or collection section (the floor level or SLB side), and the large volume mailers section (the high-platform or LVM side). As mail bags dumped from the high side often contain heavy objects, their handling and dumping on glacis no. 4 was designated a safety footwear task in accordance with a footwear policy issued first in April 1987 and then in May 1989. This job is carried out by postal clerks classified at the PO₄ level.

Under Canada Post's footwear policy, these PO₄ tasks, inasmuch as they involved duties requiring wearing protective footwear, were to be removed from the job rotation scheme and assigned to "only those employees designated and provided with footwear." The statement

also carried a description of the process for canvassing volunteers and designating employees when necessary. According to the complainant, this policy was never actually implemented, at least as far as the designation process was concerned. This claim is supported by Marc Béland, a member of the plant's safety committee, who testified that was the case when he joined the committee in January 1988. Canada Post submits that this policy was implemented on or about April 30, 1987. The complainant's current job, except in rare circumstances, the nature of which is at dispute as we will see, is not a safety-footwear designated one.

Mr. Berry has worked for Canada Post for the last 18 years. During that period, he held a variety of union functions, including chief steward of the machine processing division, member of the joint safety and health committee for 9 years, and member of a safety and health sub-committee. While his regular duties did not require wearing safety boots, the complainant had been issued a pair in late summer of 1987 for which he paid a higher-quality differential. As they were partly his, he admitted having worn them for non-work activities. He got them, he told the Board, because there was no clear policy in place, and "he jumped on the band wagon." On November 9, 1989 he was issued a voucher for the purchase of a new pair of safety boots.

This issue of the voucher first surfaced in late October 1989 when, in response to a question by the shift supervisor, R.A. Woods, as to why he was not wearing his boots, Mr. Berry replied that they were "no good." However in November, Mr. Berry was ordered, and decided after much protest, to put on his old boots to perform certain housekeeping duties, including moving monotainers, a safety-toe designated task.

A meeting ensued between the complainant and officers of the employer's labour relations department over whether the complainant would be sent to get the new safety boots. Mr. Woods had allegedly threatened him with discipline if he failed to do so. According to Mr. Berry, Ms. Denis of Canada Post had assured him following the meeting that he would not have to get new boots. Mr. Woods admitted during cross-examination that he himself had initiated the process leading to the issuance of the voucher. As it turned out, the complainant never did pick up the boots. He explained to the Board that he had never volunteered to do safety-toe work, and that the policy seemed to change in a way that would require him to work on the dock. Mr. Dunmall's account differs: at the time of his refusal of February 7, Mr. Berry had allegedly replied that his conditions had not been met, specifically, time off, and reimbursement of related expenses such as a cab fare and car insurance premium.

III

On February 7, 1990, Brian Dunmall, the supervisor, in the presence of R. Woods, Shift No. 2 Supervisor, ordered the complainant to go up on top of glacis no. 4 and dump mail. This order came shortly before noon. By then, Mr. Dunmall had decided to shut down the GDS unit to which Mr. Berry and seven of his colleagues had been assigned for their early morning shift. GDS is a machine mail coding set-up involving a series of desks, at which sit employees, whose task is to read the code and key in the relevant information for use by the coder.

Mr. Dunmall testified he had decided to shut the GDS down at 11:45 a.m. because it was no longer efficient to run as the volume of the morning incoming mail abates

substantially. Employees are then assigned other duties, which is what happened on February 7, 1990. Three employees were sent to registration, one to city mail, one to rejects (misidentified or misrouted mail). The remaining three, i.e. Karen Berryman, Andy McDonnel and Patrick Berry, were requested to proceed to glacis no. 4. Mr. Dunmall testified that of these three employees, only Mr. Berry was assigned a safety-toe job, namely dump mail bags on the high side of the glacis (LVW). Mr. McDonnel who had no company-issued protective footwear was assigned a sorting task. Finally, he testified that he was ordered to go up the high side to dump mail without proper footwear and had complied with the order because of an implied threat of discipline if he refused. The respondent denied that allegation.

Of the personnel available on that shift, five employees with safety boots were not assigned safety-footwear jobs after the GDS shut down, Mr. Dunmall acknowledged. He had called on Mr. Berry for many reasons. As a postal clerk, the complainant is expected to perform a wide variety of tasks, including housekeeping assignments; he was not asked to do rejects, because the last time he did, he had needed assistance. However, Mr. Dunmall knew from a previous conversation and from the voucher incident that Mr. Berry owned a pair of safety-toe boots.

IV

In broad terms, this is the backdrop against which Mr. Berry's refusal happened on February 7, 1990. At first, a discussion involving Messrs. Dunmall, Berry, and the shift supervisor, R. Woods, took place at the GDS. Mr. Woods had followed Mr. Dunmall in anticipation of problem from the complainant over the reassignment.

Initially, Mr. Berry said he had no safety boots; after Mr. Dunmall told him he had a pair in his locker, he said they were "uncomfortable or too hot"; and, finally, he said they were unsafe. Mr. Dunmall reiterated the order; as that order went unheeded, Mr. Woods intervened and told the complainant to go and dump mail or to go home without pay. As Mr. Berry continued to refuse, Messrs. Woods and Dunmall walked away, the latter going to fetch emergency suspension forms.

Mr. Berry's account of this exchange differs on only one significant aspect, namely that he had asked to call his chief steward, Bob Burden, but had been denied this request. Mr. Dunmall could not recall that the complainant ever made such a request. In the meantime, the complainant went to the glacis area without his safety boots on, and stood on the collection side, not the high side from which dumping is done. In response to Mr. Dunmall's reiterated order, Mr. Berry repeated his boots were unsafe and hurt his feet.

By then, the issue of safety had definitely been raised but Messrs. Woods and Dunmall insisted that the complainant had had ample time to get new boots and, in any event, that he already had a pair and should put them on. As the argument went on, R. Woods told the complainant he was suspended, and ordered him to leave the plant. Mr. Berry refused and asked that this order be put in writing. Mr. Dunmall then went back to his office to rectify an error he had made on the suspension form and returned to hand it out to Mr. Berry. By then, Mr. Berry had left the glacis and gone to the locker room and was putting on his boots. He had done so on the advice of his chief steward, Bob Burden, whom Mr. Berry had just contacted over the in-house telephone. Mr. Berry testified that his union representative expressed

surprise: the issue was thought to have been put to rest last November following the meeting with the employer's labour relations officers. Still, Mr. Burden had advised that he should get his boots on and that they talk to management to resolve the issue. Except for telling them to "get off his back," Mr. Berry ignored the presence of Messrs. Dunmall and Woods as he put on his headset. He refused to sign the suspension form, and went back to the glacis area where he continued to refuse to dump mail saying it was unsafe. Bob Burden turned up at the glacis and asked Mr. Woods to let Mr. Berry dump bags now that he had his boots on. Mr. Woods replied that it was "too late," and ordered the complainant to leave the building. The complainant finally accepted his suspension form and left after prompting by Mr. Burden who escorted him out of the building.

V

Counsel for Canada Post argued that the central issue of the case is the employer's right to direct and manage its work-force. This Board should not decide who should be assigned, and whether the work requires protective footwear or not. His position was that the complainant's refusal "was cloaked in other interests" at the time, namely his "volunteer" status. On that point, the counsel suggested that the complainant's acceptance of a safety-toe assignment in November, which he had not grieved, and the fact he had not returned the voucher indicates that he was not threatened or forced to get boots, contrary to his allegations. In addition, he submitted that the complainant wanted to have it both ways, i.e. get the boots and not have to volunteer. Citing the lack of evidence given to the employer to support the complaint, he submitted that in view of

"reality of the labour situations, Mr. Berry was caught and had to go all the way with his complaint."

The complainant's counsel argued that the employer failed to set up the mechanism for investigating a right to refuse it is required to do under sections 128(7), 128(8) and 129. For counsel, Mr. Berry had "reasonable cause," as dumping without protective footwear constituted a danger, but the employer by dismissing off hand the claim foiled the investigative process he had the obligation to effect. In his opinion, reasons for the company's belief, specifically Mr. Berry's insubordinate attitude, his failure to return the voucher, or the fact that he had old boots, are not proper considerations in deciding the issue. As well, arguing other motives is not sufficient to invalidate a complaint: considering these motives based on actual evidence is what is required. As he put it: "there is bound to be other things in cases of this sort." The present situation was no exception. He emphasized that the Board had to consider the technical aspect of the case before it, namely, that the respondent failed to activate, in response to a work refusal based on safety, the investigative process under the Code. This fact, together with the onus of proof argument, suffice to put it in violation of its obligation under sections 128(7), 128(8) and 129 of the Code.

VI

The Board must determine whether Mr. Berry was suspended in violation of section 147(a)(iii) because he exercised his right under section 128(1) of the Code. More specifically, was Mr. Berry suspended because, in the language of the Code, he acted in accordance with Part II, or sought its enforcement? Did the complainant have

reasonable cause to believe that dumping mail on the glacis without adequate protective footwear would constitute a danger to his safety? And was he disciplined for that reason?

In making this determination, the Board recognizes that, under section 133(6), the respondent must demonstrate that Mr. Berry was not disciplined for having legitimately exercised his right of refusal. A crucial, yet difficult, aspect of this determination relates to the absence, in the instant case, of a clear safety object over which the parties might disagree as to its hazardous potential, such as a condition or a thing to use, again, the language of the Code. The issue here is not whether working without proper safety footwear in the dumping area of the glacis is dangerous or not; nor is it, in essence, the condition of the boots which, for reasons we will go into shortly, never got much attention; it is, pure and simple, the motivation behind Mr. Berry's decision to refuse his assignment to dump mail and the motivation behind the employer's decision to discipline him. Was Mr. Berry's decision motivated by genuine safety reasons? Did his supervisors have reasonable grounds to believe this not to be so? These are the two questions the Board has to decide.

A first consideration relates to the ongoing nature of the dispute between the complainant and Canada Post regarding his status as a so-called volunteer. Mr. Berry never volunteered for a glacis designated task; indeed, Mr. Woods testified that the complainant "never volunteered for anything." However, the fact that the complainant had received a company-issued pair of safety boots seems to have been construed by the employer as a de facto confirmation of his volunteer status. The role

played by Mr. Woods, the shift supervisor, in initiating the process that led to the issuance of the November 1990 voucher to Mr. Berry ("incorrectly issued" wrote his counsel) would seem to proceed from the same logic. According to the evidence, Mr. Berry never refused the voucher but attached to its actual use conditions he knew would probably not be met.

Another relevant factor sheds light on the issue of motivation: the state of personal animosity between the complainant and the shift supervisor, Mr. Woods. Mr. Berry's own complaint to the Board, not to mention his testimony, leaves no doubt as to his deep suspicion that Mr. Woods was out to get him, and that no trust whatsoever existed. For his part, Mr. Woods, while in the witness stand, made no effort to conceal that the feeling was mutual.

These environmental conditions are of particular importance, in the judgement of the Board, in assessing the protagonists' attitude regarding the immediate circumstances of the refusal. Upon hearing the order, Mr. Berry initially said that he had no boots, then, that they were uncomfortable and, finally, unsafe. To a person as experienced in, and conversant with, the safety mechanism of Part II of the Code, as Mr. Berry ought to have been after serving for many years on the safety and health committee, such an expression of safety concern is surprisingly underwhelming. Not emphatic enough, in any event, to have his supervisors turn their mind, however fleetingly, to this aspect of the refusal. The evidence is clear that neither Mr. Dunmall nor Mr. Woods believed for one moment that Mr. Berry's motives were genuine safety ones. Nor did, it would appear, the chief steward, Bob Burden. Mr. Burden was not called to

testify but the evidence of Mr. Berry shows that his advice to him was to put his boots on. It is assumed of course that Mr. Burden would not have put, willingly, Mr. Berry's safety at risk.

A simpler and more sensible explanation is that Mr. Berry, sensing he needed a way out of what he perceived as an all too obvious management trap, did what he considered the natural thing. He came up with answers to protect himself against possible disciplinary action. Had his supervisor accepted his first answer, he would not have had to carry out the assignment. As it turned out, that was not the case; safety, ultimately, proved to be his best answer. As the account of his phone conversation with chief steward Burden indicates, Mr. Berry saw the incident as a revival of the same issue he thought had been dealt with back in November. But, as his testimony makes clear, this was not a safety issue but rather a volunteer issue.

Many of the authorities cited by the parties, to the extent they dealt primarily with the notion of reasonable cause, are of limited application to the particular circumstances of the present case. For instance, the very broad interpretation given by this Board to this notion, namely in Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618), Alan Miller (1980), 39 di 93; [1980] 2 Can LRBR 344; and 80 CLLC 16,048 (CLRB no. 243), (in this latter case, the Board said that "proper motivation is not an issue here" pages 103; 352; and 753), and William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332), refers to a safety object whose threat potential is in dispute. In addition, the instant case features important labour relations considerations. Needless to say that the Board has expressed itself

frequently and unambiguously on the need to ensure that the right of refusal is not used to further other interests, or to bring long-standing disputes to a head. See William Gallivan, *supra*, Roland D. Sabourin, *supra*, John Charters (1989), 3 CLRBR (2d) 253 (CLRB no. 727), and Ernest L. LaBarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no. 357).

Regarding the technical aspect of the complaint, let us state clearly that the process contemplated by Part II of the Code cannot be viewed separately from its fundamental objective. To do so would undermine the very basis upon which our safety regime rests. As explained by the Board in David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686):

"... The underlying theme of Part IV is founded upon enlightened discussion and co-operative resolution of disputes. Safety cannot be treated like other conditions of employment that are subject to our adversary collective bargaining system under Part V of the Code with its give-and-take according to prevailing strengths. Safety and health should not have to be compromised.

...

... the right to refuse is not the primary vehicle for attaining the objectives of Part IV of the Code. It is there to promote early recognition of hazards so that they are brought to the attention of those responsible for safety in the work place. The right to refuse is also an emergency measure to deal with dangerous situations which crop up unexpectedly. In that context, it becomes clear why danger is defined as it is. The purpose of the right to refuse is not to settle longstanding disputes or to bring to a head differences involving technology or production practices. (See William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); and Ernest L. Labarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no.357).) The right to refuse is there to deal with situations which require immediate attention, hence the requirement for immediacy in the definition of danger. ..."

(pages 225-226; and 317-318)

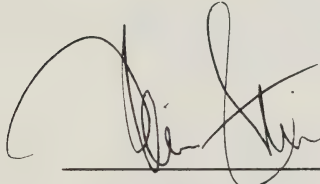
The circumstances of the present case, in the opinion of the Board, fall short of these requirements. The employer had good reasons not to believe that a safety issue was actually raised, and discussions never got to the stage of the reasonable cause "as featured in Roland D. Sabourin, supra, and William Gallivan, supra." In the final analysis, the Board is confined to the strict motivation issue, and to the question of whether the employer reacted to a genuine safety concern. The Board is convinced, after reviewing the abundant documentary and testimonial evidence before it, that Mr. Berry's motivation was not related to safety.

However, there is one aspect of the employer's conduct that touches on the broad objectives of Part II which the Board finds particularly worrisome. The situation created by the apparent lack of clarity of Canada Post's footwear policy, specifically with respect to the issue of who is a volunteer, undeniably had a high potential for conflict. It is too much to hope that when these conflicts come to a head, which invariably they do as shown in the present case, safety considerations would count for much. Again, safety and health issues should not have to be compromised. It is for this reason, as we said earlier, that the employer has a particular obligation to ensure that they do not become, through uncertainty, confusion or otherwise, too inviting targets for settling old industrial relations scores. In this vein, the Board invites the employer and the safety

committee to turn a diligent mind to this issue so as to prevent problems in the future. The present issue had, in our judgement, a very significant labour relations edge to it.

Consequently, the complaint is dismissed.

ISSUED at Ottawa this 5th day of December 1990.

A handwritten signature in black ink, appearing to read 'François Bastien', is written over a horizontal line.

François Bastien
Board Member

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Summary

EDGAR COWIE, COMPLAINANT, AND THE
CANADIAN UNION OF POSTAL WORKERS,
RESPONDENT.

Board File: 745-3666

Decision No.: 838

Résumé de Décision

EDGAR COWIE, PLAIGNANT, ET LE SYNDICAT
DES POSTIERS DU CANADA, INTIMÉ.

Dossier du Conseil: 745-3666

N° de Décision: 838

This case deals with a complaint in
which it is alleged that CUPW, the
union, breached its duty of fair
representation contained in section
37 of the Canada Labour Code (Part I -
Industrial Relations).

The complainant's employment of 6
years with Canada Post was terminated
following a period of absenteeism
resulting from an industrial accident.
The union filed a grievance and
proceeded to arbitration. Prior to
and following the commencement of the
arbitration hearing, settlement
discussions ensued which included a
cash settlement and the opportunity
for the complainant to receive a long-
term disability award. This was
refused by the complainant.

Perceiving it to be a weak case at
this point, and concerned about the
chances of a negative impact on its
bargaining unit as a whole should they
proceed with and lose this injury-at-
work related grievance, the union
decided to withdraw.

It is the opinion of the complainant
that the union should not have
withdrawn his grievance once they had
commenced the arbitration process.

The ground rules and established
jurisprudence were applied to the
evidence preferred at the hearing.
The Board found that the decision made
by the union in this case was made
well within the discretion permitted
bargaining agents when faced with
difficult decisions concerning
dismissal grievances.

Il s'agit d'une plainte selon laquelle
il est allégué que le SPC, le
syndicat, a manqué à son devoir de
représentation juste prévu à l'article
37 du Code canadien du travail (Partie
I - Relations du travail).

La plaignant, qui travaillait à la
Société canadienne des postes depuis
six ans, a été congédié après s'être
absenté en raison d'un accident de
travail. Le syndicat a déposé un
grief et l'a porté à l'arbitrage.
Avant l'audition de la plainte par
l'arbitre, et même après que celle-ci
a été entamée, des discussions se sont
poursuivies pour en arriver à un
règlement, lequel comprenait un
dédommagement en espèces et la
possibilité pour le plaignant de
recevoir une prime d'invalidité de
longue durée. Le plaignant a refusé
cette offre.

Estimant alors que le cas n'était pas
très solide et inquiet des risques de
répercussions négatives sur son unité
de négociation dans l'ensemble s'il
poursuivait l'affaire et qu'il perdait
ce grief relatif à un accident de
travail, le syndicat a décidé de
retirer le grief.

Selon le plaignant, le syndicat
n'aurait pas dû retirer son grief une
fois que la procédure d'arbitrage
était entamée.

Les principes de base et la
jurisprudence établie ont été
appliqués aux éléments de preuve
présentés à l'audience. Le Conseil
a jugé que la décision du syndicat
dans ce cas avait été prise bien en-
deçà des limites discrétionnaires
allouées aux agents négociateurs qui
doivent prendre des décisions
difficiles concernant des griefs de
congétiement.

The Board was more than satisfied that the union acted at all times in good faith and that their actions were not arbitrary or discriminatory. The complaint was dismissed without merit.

Le Conseil était entièrement convaincu que le syndicat avait en tout temps agi de bonne foi et que les mesures qu'il avait prises n'étaient pas arbitraires ou discriminatoires. La plainte a été rejetée parce qu'elle n'était pas fondée.

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Reasons for decision

Edgar Cowie,
complainant,
Canadian Union of Postal
Workers,
respondent,
and
Canada Post Corporation,
employer.

Board File: 745-3666

The Board was composed of Vice-Chairman Hugh R. Jamieson and Members Linda M. Parsons and Evelyn Bourassa.

These reasons for decision were written by Member Linda M. Parsons.

Appearances:

Edgar Cowie, for himself;

James K.A. Hayes, for the Canadian Union of Postal Workers; and

Ian Szlazak, for Canada Post Corporation.

I

The complainant, Mr. Edgar Cowie, filed this complaint with the Board on June 5, 1990 alleging that the Canadian Union of Postal Workers (the union or CUPW) had breached its duty of fair representation which is contained in section 37 of the Canada Labour Code (Part I - Industrial Relations):

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The complainant was employed as a security guard at Canada Post Corporation (CPC or the employer) from June 1982 to March 14, 1988 when his employment was terminated by the employer on grounds of incapacity. This came after a period of absenteeism following an industrial accident on July 30, 1987 wherein the complainant broke his ankle and damaged his back. CUPW represented the complainant in the resulting grievance and an arbitration hearing was scheduled to deal with the dismissal on January 26, 1990. Before the arbitration hearing commenced CUPW entered into settlement discussions with CPC and a package was drawn up which included a cash settlement and the opportunity for the complainant to receive a long-term disability award. The complainant refused to accept this settlement offer.

The arbitration hearing commenced with the employer presenting its first two witnesses. The matter was then adjourned to continue in late May 1990.

Prior to the resumption of the arbitration hearing the union attempted once again to have the complainant accept a settlement rather than proceed with what CUPW saw as a weak case. The union was also concerned about the chances of a negative impact on its bargaining unit as a whole should they proceed with and lose this injury-at-work

grievance. The complainant refused to budge and the union withdrew the grievance. It was these actions by the union that the complainant said violated section 37 of the Code.

In accordance with the Board's usual practices the complaint was investigated by an officer and a comprehensive report was submitted to the Board for its preliminary consideration. One of the objects of this exercise is to allow the Board to determine if the complaint can be disposed of without the need for a public hearing. This practice and the underlying policy reasons are set out at length in Gordon Duncan McCance (1985), 61 di 49; 10 CLRBR (NS) 23; and 85 CLLC 16,042 (CLRB no. 515). This panel of the Board subscribes to what was said there.

In this case, it was the decision of the panel after examining the submissions of the parties and the investigating officer's report that there were some factual and credibility issues that could only be resolved by viva-voce evidence. These issues arose in the area of the settlement talks and what was said to the complainant about the impact of the withdrawal of the grievance and his refusal to accept the settlement package. According to the complainant's submissions, he was offered much less than what the union submitted and he did not understand that the settlement offer was not there if the union withdrew the grievance. The result was, of course, that the complainant was left with nothing.

For the aforesaid reasons, a hearing was conducted into this matter at Toronto on November 8, 1990.

II

At the hearing CUPW presented its case through the testimony of Mr. Timothy Hadwen, the solicitor who handled the grievance. The Board also heard from Mr. Eric DePoe who had actually withdrawn the grievance. There is no need to go into the evidence of these two witnesses in any great detail; suffice it to say that they were both credible, professional witnesses who had obviously taken great pains to do everything they could for the complainant. There was absolutely no signs of malice or hostility on their part towards the complainant. Their testimony can be summarized as follows.

First of all, this whole area of accommodation of injured workers is a developing area of arbitral law. Obviously it is an extremely sensitive and often emotional concept to deal with, particularly for the complainants. Mr. Hadwen is experienced in this field and is knowledgeable about the law and precedents. It was his professional opinion that one of the fundamental things he required to have any hope in this case was full disclosure by the complainant of his medical history; everything from his own doctors, his personal file at work and all of his dealings with the Workers Compensation Board. According to Mr. Hadwen this vital information was not forthcoming from the complainant who refused to sign the necessary releases. What Mr. Hadwen eventually obtained was dribs and drabs of information which the complainant thought were useful. Further, Mr. Hadwen had grave doubts about the complainant's lack of candor and the effect of his

personal testimony before an arbitrator. It was Mr. Hadwen's view that the case before the arbitrator was weak at best. Mr. DePoe was of the same opinion.

It was this feeling of hopelessness and frustration with the complainant's attitude that was the catalyst for the settlement talks. Rather than wait to expose the weaknesses in their case, Messrs. Hadwen and DePoe decided to attempt to salvage as much as they could for the complainant. The settlement package, which we will not go into for obvious reasons, was the best they could do in the circumstances. When this was refused by the complainant and having had the benefit of hearing CPC's case, the union said it had no option but to withdraw. The deciding factor was the real concern about a bad arbitral precedent which could affect other disabled workers the union represents.

The complainant also testified before the Board and, the kindest thing we can say about his credibility is that we now fully understand Mr. Hadwen's concerns about the complainant's candor.

III

The Board has already made its views known about its perceived role in supervising the arbitration process through the duty of fair representation provisions in the Code. In Luccio Samperi (1982), 49 di 40; [1982] 2 Can LRBR 207 (CLRBR no. 376), the Board said the following at pages 50-51 and 214-215:

"The issue of the quality of representation at arbitration by union officials and their counsel has been scrutinized by the courts in the United States which hear duty of fair representation suits. We previously characterized this as an extreme application of the duty (see Brenda Haley (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 at pp. 302, 507, and 14,622). There is concern in the United States about the effect this has on the role of the employer and arbitrator in proceedings that may be vitiated because of the quality of representation of the union's representative or counsel (see the references in Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 at pp. 322, 130, and 14,830; and N. Gregory Smith, 'Finality and Fairness in Grievance Arbitration: Whether Allegations of Unfair Representation Justify Termination of Arbitration' [1978] Brigham Young L.R. 132).

It would be a clear case of the tail wagging the dog if this Board were to effectively quash arbitration awards because we disapproved of the manner in which a union presented a grievance at arbitration. We do not consider it to be within the purview of our role or responsibility to evaluate the competence of union representatives or their counsel. Nor do we consider it to be compatible with the public policy purposes and objectives of party controlled compulsory grievance arbitration as a substitute for mid-agreement work stoppages expressed in section 155 of the Code (now section 57). (see the discussion in James E. Dorsey, 'Arbitration Under the Canada Labour Code: A Neglected Policy and an Incomplete Legislative Framework' (1980), 6 Dalhousie L.J. 41). The duty of fair representation has a role under the Code but it must have its limits. That limit falls short of an avenue of appeal from arbitral decisions based upon a judgment by this Board's legal and non-legally trained members about the competence and performance of union representatives and their counsel.

Human behaviour is too diverse for the establishment of unequivocal rules. We cannot say the duty of fair representation has absolutely no role during the arbitration process. There may be the extreme case where a union in bad faith merely puts on a charade with employer collusion or the union representative or counsel appears inebriated. Those like all cases in this area will turn on their facts. The message is, however, that this Board will not, through the duty of fair representation, microscopically review union conduct during arbitration proceedings."

(emphasis added)

We agree with those statements and adopt them as our own for the purposes of this complaint. Even if we thought

that Messrs. Hadwen and DePoe were wrong in their assessment of the merit of the complainant's grievance, and we do not think for one moment that they were, we would not replace their judgment with our own. The decisions which they made were well within the discretion permitted bargaining agents when they are faced with difficult decisions whether to proceed with a dismissal grievance. The ground rules for this discretion have been well established by labour relations boards in all jurisdictions across the country.

These rules were confirmed by the Supreme Court of Canada in Canadian Merchant Service Guild v. Gagnon et al. (1984), 84 CLLC 14,043:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

3. *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

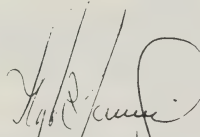
4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

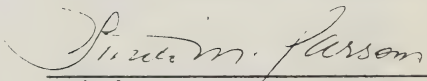
(page 12,188)

These same rules surely apply where a trade union has decided to proceed with a grievance to arbitration and, once there, decides that it is in its best interests to withdraw the grievance at any stage in the arbitration process.

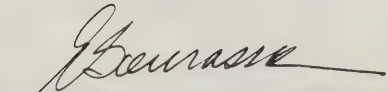
Having heard this complaint, we are more than satisfied that the union acted at all times in good faith. Its actions were not arbitrary or discriminatory. We are further satisfied that it did communicate clearly to the complainant all of his options and the impact of his non-acceptance of the package offer which the union negotiated with the employer. In short, the complaint has no merit and it is dismissed accordingly.



Hugh R. Jamieson
Vice-Chairman



Linda M. Parsons
Member



Evelyn Bourassa
Member

DATED at Ottawa this 12th day of December, 1990.

information

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SUMMARY

ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS, COMPLAINANT, AND CANADIAN BROADCASTING CORPORATION, EMPLOYER.

Board File: 745-3191

Decision No.: 839

RÉSUMÉ

ALLIANCE DES ARTISTES CANADIENS DU CINÉMA, DE LA TÉLÉVISION ET DE LA RADIO, PLAIGNANTE, ET SOCIÉTÉ RADIO-CANADA, EMPLOYEUR.

Dossier du Conseil: 745-3191

Décision n°: 839

Canada Labour Code (Part I - Industrial Relations). Preamble. Section 8. Unfair labour practice complaint under sections 94, 94(1)(a), 94(3)(a)(i), 94(3)(b), 94(3)(e), and 96. International Labour Convention No. 87. Granted in part by the majority.

The Facts

In November 1988, Mr. Dale Godhawk, journalist and radio host with CBC's English network, was forced to resign his position as president of the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) if he wished to remain in his hosting position at CBC.

ACTRA is the bargaining agent representing artists and journalists of CBC. In the fall of 1988, Dale Goldhawk was also president of ACTRA. At that time, a federal election campaign was underway and one of the major issues of the campaign was the conclusion of a free trade agreement (FTA) with the United States. ACTRA formed part of a group of associations opposed to the agreement. As president of ACTRA, Mr. Goldhawk was also, according to the union's constitution, its principal spokesperson.

As a journalist with CBC, Mr. Goldhawk was also subject to the Corporation's Journalistic Policy. This policy, which has been in existence for many years, forbids journalists to participate publicly in activities that may negatively affect CBC's image of impartiality.

In September 1988, Mr. Goldhawk, as president of the union, signed an article in the union's newsletter, ACTRASCOPE, which is distributed to the union members. In this article, Mr. Goldhawk reiterated the union's position against the FTA and invited members to take advantage of the election campaign to unite against the agreement. In early November 1988, a columnist with a daily newspaper revealed the content of Mr. Goldhawk's article to the public and questioned the coverage given by CBC to the free trade

Code Canadien du travail (Partie I - Relations du travail). Préambule. Article 8. Plainte de pratique déloyale en vertu des dispositions 94, 94(1)a), 94(3)a)(i), 94(3)b), 94(3)e), et 96. Convention internationale du travail, n° 87. Accueillie en partie par la majorité.

Les faits

En novembre 1988, M. Dale Goldhawk, journaliste et animateur de radio auprès du réseau anglais de Radio-Canada (CBC) a été contraint de démissionner de la présidence de l'Alliance des artistes canadiens du cinéma, de la télévision et de la radio (ACTRA) s'il désirait conserver son poste d'animateur à Radio-Canada.

ACTRA est l'agent négociateur représentant des artistes et des journalistes de Radio-Canada. À l'automne 1988, Dale Goldhawk était aussi président d'ACTRA. À cette époque, il y avait campagne électorale au fédéral et un des thèmes importants était la conclusion d'un traité de libre échange (TLE) avec les États-Unis. ACTRA faisait partie d'un regroupement d'associations s'opposant à l'entente. En qualité de président d'ACTRA, M. Goldhawk était son principal porte-parole, selon les statuts du syndicat.

En qualité de journaliste à Radio-Canada, M. Goldhawk est soumis à la politique journalistique de Radio-Canada. Cette politique existe depuis longtemps et interdit au personnel journaliste de participer publiquement à des activités susceptibles de porter atteinte à l'image d'impartialité de la Société.

En septembre 1988, M. Goldhawk, en qualité de président du syndicat, signe un article dans le journal du syndicat ACTRASCOPE. Ce journal est distribué aux membres du syndicat. Il y rappelle la position du syndicat contre le TLE et invite ses membres à profiter de la campagne électorale pour se mobiliser contre l'entente. Au début de novembre 1988, un chroniqueur d'un quotidien révèle au grand public l'existence de l'article de M. Goldhawk et s'interroge sur la couverture que donne Radio-Canada aux

supporters. Mr. Goldhawk then left his position as radio host until after the election.

After the election, CBC informed Mr. Goldhawk that in order to return to his position as radio host, he would have to resign as union president. CBC recognized that Mr. Goldhawk's work was excellent but that his association with ACTRA could negatively affect CBC's image. Mr. Goldhawk then resigned from his position as president of ACTRA and a complaint was filed.

The Decision

Lawful union activities (Section 8). The publication of an article is a union activity under section 8 of the Code. A union's right to designate in its constitution an official spokesperson is a union activity under section 8 of the Code. A union is free to express itself in a newsletter, notably on matters of general interest to its members. Unions in the arts and communications fields may express their concern about free trade just as unions in the trucking industry may do so about deregulation. (A member has expressed a dissenting opinion on this issue.)

Allegations of violation of sections 94(3)(i), 94(3)(e) and 96 (Unfair labour practice). Rejected. It was alleged that Mr. Goldhawk had been personally penalized because of his union activities. According to the case law, these provisions of the Code require evidence of anti-union animus on the part of the employer in order to determine that these provisions have been violated. An analysis of past practices at CBC led the Board to determine that the corporation's decision with respect to Mr. Goldhawk was not tainted with anti-union animus.

Allegations of interference in the union's affairs (Section 94(1)(a)). Granted by the majority. A violation of this provision is established through an objective test concerning the effects of the employer's acts and does not require anti-union animus. The employer's decision, in the instant case, had the effect of depriving the union of its president and interfered with its freedom to designate its officials.

The majority of the Board is of the opinion that the corporation's actions with respect to a union publication were unwarranted. The Board's case law concerning the right of union officials to publicly express an opinion was reviewed. The decisions of the International Labour Conference concerning Convention No. 87 were also reviewed. Other means exist to allow CBC to protect its integrity without interfering in union affairs. A balance must be sought between the employer's right to manage its business and the union's right to manage its lawful activities. (*Cadillac Fairview Corp. Ltd. v. R.W.D.S.U.* (1989), 71 O.R. (2d) 206 (C.A.)). Complaint granted by the majority.

partisans du TLE. M. Goldhawk se retire alors de son émission jusqu'après les élections.

Après les élections, Radio-Canada avise M. Goldhawk qu'il ne pourra reprendre son émission à moins de quitter la présidence d'ACTRA. Radio-Canada reconnaît que le travail fait en ondes par M. Goldhawk est sans reproche, mais juge que son association avec ACTRA peut porter atteinte à l'image de Radio-Canada. M. Goldhawk démissionne alors de la présidence d'ACTRA, d'où la plainte.

Décision

Notion d'activités syndicales licites (Article 8). La publication d'un article constitue une activité syndicale au sens de l'article 8 du Code. Le droit pour un syndicat de déterminer dans ses statuts qui sera son porte-parole est une activité syndicale au sens de l'article 8 du Code. Un syndicat peut librement s'exprimer dans son journal y compris sur des questions générales susceptibles d'intéresser ses membres. Les syndicats d'artistes et de communicateurs peuvent s'inquiéter du TLE au même titre que ceux des camionneurs peuvent s'inquiéter de la déréglementation du transport. (Un membre est dissident sur ces questions.)

Allegations de manquements aux dispositions 94(3)a)(i), 94(3)e) et 96 (Pratiques déloyales). Rejetée. Selon ces allégations, M. Goldhawk aurait été pénalisé personnellement en raison de ses activités syndicales. Selon la jurisprudence, le Code exige la preuve d'un dessein anti-syndical (animus anti-syndical) chez l'employeur pour qu'on puisse conclure à une violation du Code en vertu de ces articles. Après une analyse détaillée des pratiques passées de Radio-Canada, le Conseil a conclu que la décision de Radio-Canada à l'égard de M. Goldhawk n'avait pas été prise dans un dessein anti-syndical.

Allégation d'ingérence illégale dans les affaires du syndicat (Alinéa 94(1)a). Accueillie par la majorité. La violation de cette disposition résulte d'un test objectif portant sur l'effet d'un geste patronal; aucun animus anti-syndical n'est requis. La décision de l'employeur a l'effet de priver le syndicat d'un président et également de l'empêcher de désigner ses dirigeants.

La majorité du Conseil a jugé que le geste posé par la société à l'égard d'une publication interne d'un syndicat était injustifié. Revue de la jurisprudence du Conseil au sujet du droit des dirigeants syndicaux de prendre des positions en public. Revue des décisions de l'Organisation internationale du travail (OIT) au sujet de la Convention n° 87. D'autres moyens existent pour préserver l'intégrité de Radio-Canada sans s'ingérer indûment dans les affaires syndicales. Un équilibre doit être recherché entre le droit de l'employeur de gérer son entreprise et le droit des syndicats de diriger leurs activités licites (*Cadillac Fairview Corp. Ltd. v. R.W.D.S.U.* (1979), 71 O.R. (2d) 206 (C.A.)). Plainte accueillie par la majorité.

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Conclusion and Remedies

Section 99. The Board determined that it was sufficient to declare that CBC had violated section 94(1)(1). Mr. Goldhawk will be free to return to his position as president of ACTRA if he so desires and CBC is ordered to refrain from any discrimination if he so chooses.

Dissenting Opinion (Ms. Evelyn Bourassa)

The minority disagrees with the majority on the question of what constitutes interference with the activities of a trade union.

All lawful union activities are not protected by the Code. Union activities must relate to the collective bargaining process in order to receive protection under the Code. In this case, the activities for which the Union seeks the protection of the Code are purely political activities. Such activities are therefore too remotely connected to the dominant purpose of the Canada Labour Code to attract the right asserted by the complainant. When these latter non-protected activities are in issue, as in this case, the tests developed for protected activities have no application.

The minority would have therefore rejected the allegation of interference under section 94(1)a).

Conclusion et mesure réparatrice

Article 99. Le Conseil a jugé qu'une déclaration selon laquelle Radio-Canada avait violé l'alinéa 94(1)a) était suffisante. Il sera libre à M. Goldhawk de reprendre son poste à ACTRA s'il le désire et Radio-Canada devra s'abstenir de toute ingérence à cet égard.

Dissidence (Mme Evelyn Bourassa)

La minorité n'est pas d'accord avec la majorité sur la question de savoir ce que constitue de l'ingérence dans les activités d'un syndicat.

Les activités licites d'un syndicat ne sont pas toutes protégées par le Code. Ces activités doivent avoir trait au processus de négociation collective pour recevoir la protection du Code. En l'espèce, les activités pour lesquelles le syndicat tente d'obtenir la protection du Code sont des activités d'ordre purement politique. Par conséquent, de telles activités sont trop éloignées du but primordial du Code canadien du travail pour que le plaignant puisse se prévaloir de son droit. Lorsque des activités non protégées sont en jeu, comme en l'espèce, les critères élaborés à l'égard des activités protégées ne s'appliquent pas.

La minorité aurait donc rejeté l'allégation d'ingérence aux termes de l'alinéa 94(1)a).

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for Decision

Alliance of Canadian Cinema,
Television and Radio Artists,

complainant,

and

Canadian Broadcasting
Corporation,

employer.

Board File: 745-3191

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Ms. Linda Parsons and Ms. Evelyn Bourassa, Members.

Appearances:

Mr. Paul Falzone, counsel, assisted by Mr. Gary Neil,
General Secretary, for the Alliance of Canadian Cinema,
Television and Radio Artists; and

Mr. Roy L. Heenan, counsel, assisted by Ms. Donna M. Logan,
Program Director (Radio Networks), and Mr. Claude Mason
(Industrial Relations), for the Canadian Broadcasting
Corporation.

The reasons for decision were written by Mr. Serge Brault,
Vice-Chairman. Ms. Bourassa's dissenting opinion is
appended.

I

The procedure

This is a complaint filed by the Alliance of Canadian
Cinema, Television and Radio Artists (ACTRA) against the
Canadian Broadcasting Corporation (CBC) alleging violations
of sections 94(1)(a) and 94(3)(a)(i), 94(3)(b), 94(3)(e),
and 96 of the Canada Labour Code (Part I - Industrial
Relations).

These proceedings were introduced after the resignation of Mr. Dale Goldhawk as President of ACTRA in the fall of 1988. According to the complainant, Mr. Goldhawk, a broadcast journalist of longstanding with the CBC, was unlawfully coerced by the CBC into resigning his position as president of ACTRA, a labour union representing writers, performers and broadcast journalists. CBC is Canada's public broadcasting system.

All the provisions invoked by ACTRA deal with unfair labour practices and read as follows:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;

...

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

...

98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

In addition to being contested on its merits, this complaint was first met by a motion of the CBC to have the whole matter deferred to arbitration pursuant to section 98(3) of the Code:

"98.(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

That motion was taken under reserve and the Board proceeded to hear the parties' evidence in Toronto on September 19-20 and on December 12, 13 and 15 of 1989.

II

The Facts

The Controversy: the article in ACTRASCOPE

ACTRA is a major union organization comprising approximately 10,000 members across Canada. Its membership is divided into three guilds: the performers (about 7500, mainly actors), the journalists (about 1300), and the writers (about 1200).

It is fair to say that ACTRA is one of the most important labour organizations involved with the scenic arts in English Canada. It has long been associated with cultural issues and, for instance, appeared before Parliament on the new Broadcasting Act. It is a strong advocate of the Canadian content rule for broadcasters and was a strong opponent of the Free Trade Agreement (FTA) with the U.S.A. Long before the last election, it was part of an Anti-Free Trade Coalition of Cultural Organizations that included another bargaining agent at the CBC, the National Association of Broadcast Employees and Technicians (NABET).

Canada eventually approved an FTA at the end of 1988 that excluded the "cultural industries" from its provisions on trade in services and investments:

"'Cultural industries' are broadly defined within the FTA to include the publication, distribution, or sale of books, magazines, periodicals, newspapers, and music; the production, distribution, sale, or exhibition of film, video recordings, audio or music recordings; and radio and TV broadcasting (including cable TV, satellite programming, and broadcast networks)."

(Debra P. Steger, A Concise Guide to the Canada-United States Free Trade Agreement, Toronto, Carswell, 1988, page 49)

In the late summer of 1988, in his capacity as ACTRA President, Mr. Goldhawk signed an article in the Fall issue of ACTRA's newspaper, ACTRASCOPE. ACTRASCOPE is the official publication of ACTRA and is basically distributed to its members. Under the heading "The President Reports," Mr. Goldhawk takes a strong position against the Free Trade Agreement then being negotiated with the USA. His article, entitled "Election brings the trade debate to a boil" attacks the free trade deal and invites the membership to mount a campaign opposing the deal. By then, the country

is in the middle of a general election where Free Trade is a central issue.

Mr. Goldhawk's and CBC's problems started when, in early November 1988, the existence of that article was revealed to the public in a column by Mr. Charles Lynch appearing in the Ottawa Citizen and in the Vancouver Province. ("Free Trade: foes are alive and well and working for the CBC").

Mr. Lynch, describing himself in his article as a "disgruntled 30-year member of ACTRA," writes about Mr. Goldhawk's article and more broadly about those in ACTRA he describes as having "vested interests" against free trade. According to Mr. Lynch's column, ACTRA had been campaigning since early 1988 to defeat the Free Trade Agreement and "has been deluging its members with literature urging leadership in the fight [against free trade]." Mr. Lynch goes on to comment on Mr. Goldhawk's position with the CBC as well as in ACTRA. He writes:

"But in his role as ACTRA president, he is part of the battle, and it is my submission that the listening public is entitled to disclosure of that fact during the airing of his program and other programs with heavy input from ACTRA members."

Rather candidly, Mr. Lynch tells of his own biases:

"Commentators, panellists and anchors are full of biases and slants, as witness my own participation in the line of work."

In conclusion, he reveals that he is personally opposed to his union using his money "to bolster the anti-free trade case, and urging us to use all our efforts, and all our special access to the channels of communication... That includes massive access to the CBC facilities, as well as those of the other networks."

At the time (as he does today), Mr. Goldhawk hosted "Cross Country Checkup," a public affairs radio program broadcast weekly nationwide on the CBC English network. As a CBC journalist, he is subject to CBC Journalistic Policy, a subject we will return to further in these reasons. His show is produced by Alex Frame, the area head of Current Affairs for CBC Radio.

Mr. Lynch's article was first brought to the attention of Mr. Frame by a producer from a CBC affiliate who wished to prepare an item on the incident with Mr. Goldhawk. This in turn prompted a series of meetings between Mr. Goldhawk and CBC representatives to determine the appropriate course of action in the circumstances. At issue was whether or not CBC's Journalistic Policy had been violated by Mr. Goldhawk's article in ACTRASCOPE and more generally by his public involvement as Chairman of ACTRA.

In the opinion of the CBC head of Radio networks, Ms. Donna Logan, Mr. Goldhawk had indeed violated the Journalistic Policy and something had to be done. Rather than decide the matter right away, it was agreed, at Mr. Goldhawk's suggestion, that he would withdraw from "Cross Country Checkup" until after election day. Mr. Goldhawk simultaneously took leave from any public involvement as Chairman of ACTRA for the remainder of the campaign. In a press release issued on November 9, 1988, CBC, while recognizing Mr. Goldhawk's professional conduct had been impartial and without reproach, describes his decision as follows:

"FOR IMMEDIATE RELEASE"

Dale Goldhawk, host of CBC Radio's CROSS COUNTRY CHECKUP on Sunday afternoons, has been granted

leave from the program until after the November 21 federal election.

Goldhawk, who is also the president of The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), requested the leave as a result of concerns that his position within the union may create a perception of partiality with regard to the free trade issue.

ACTRA has publicly declared its opposition to the free trade agreement.

In agreeing to his request, Donna Logan, Program Director CBC Radio, said that, throughout the debate over free trade, Goldhawk's journalism has been impartial and beyond reproach.

Logan said that following the federal election, Goldhawk and the CBC will be discussing his ACTRA presidency as it applies to the CBC's established Journalistic Policy, in the hope that he will return to CROSS COUNTRY CHECKUP."

(emphasis added)

Ms. Logan is responsible for the administration of the Journalistic Policy with respect to radio personnel and Alex Frame is Mr. Goldhawk's immediate supervisor. In Mr. Frame's opinion, CBC had very serious reasons to be concerned since Mr. Goldhawk had taken a specific position with regard to free trade and had also "contradicted Flora MacDonald, the Minister of Communications." The part of the article that concerned Mr. Frame more particularly was the following:

"Despite Communications Minister Flora MacDonald's brave words that 'Canada's right to determine our own culture would be respected in every degree' in a free trade deal, the distressing fact is, that will not happen.

Instead, Canada's right to develop new cultural policies, to assist selected segments of our industry, to help shape a unique feature film, television and radio industry here, in the shadow of the American giant, will not be done without the express approval of that American giant."

(Dale Goldhawk, "Election brings the trade debate to a boil," ACTRASCOPE, Fall 1988, Volume 16, kNumber 2, page 7)

When asked by counsel to specify what precisely bothered him in this excerpt, Mr. Frame answered:

"A. Well, it concerned, it concerned me because in fact he was specific... in this comment, the comments that Dale make he is specifically in opposition to the free trade agreement. It is, it also upsets me because he's rendering opinion that certainly in this article are not, are not supported by facts. And that, this is not, not the role of a CBC journalist.

Q. He wasn't, you'll agree with me that he was not acting as a CBC journalist in writing this article.

A. Well, it would seem... it would seem to me that when one is a journalistic host of a national radio program, that when one operates publicly that role is, is always there and, and his reputation as a journalist and as a CBC journalist is in, is in fact always on the line."

(transcript of proceedings, September 19-20, 1989, page 71; emphasis added)

CBC knew that Mr. Goldhawk was the president of ACTRA when they hired him and, according to Ms. Logan's and Mr. Frame's evidence, they did not perceive that as being a problem at the time. According to Ms. Logan, Mr. Goldhawk was not the first union president hired as a host, and it was only when he publicly identified himself with a controversial matter that the problem arose. Whether he did it in a union capacity or otherwise was not relevant. In the words of Ms. Logan:

"[CBC's policies have] ... nothing to do with whether [the hosts] hold office in unions."

(transcript of proceedings, September 19-20, 1989, page 15)

In the view of Ms. Logan, the CBC is not concerned that "... the union takes positions on free trade or anything else...", but becomes concerned "... when a member of our journalistic unit becomes a spokesperson on that issue."
(transcript of September 19-20, 1989 proceedings, page 49)

Regarding the notion of what CBC Journalistic Policy considers to be a "public position" on an issue, Ms. Logan explained that in her view, it is "anything that has broad distribution" (transcript of September 19-20, 1989 proceedings, page 50). She goes on to explain:

"... It doesn't have to necessarily be in a newspaper but ACTRA has some 10,000 members, I would consider [ACTRASCOPE] to be public because once its members get it presumably others see it. And in this case, when Charles Lynch wrote the column that certainly was public."

(transcript of proceedings, September 19-20, 1989, page 50)

Asked whether she felt that Mr. Goldhawk's chairmanship would still have been a problem under the Journalistic Policy had an ACTRA staff member and not Mr. Goldhawk signed the impugned article in ACTRASCOPE, Ms. Logan replied in the negative. She was then asked to explain that position, which seemed to dissociate the president of the association from that association's official positions. She explained that when the president is not directly involved, he can then only be associated with a particular position by implication. As she said:

"By implication, but not overtly. One assumes that if you're president of a union which has taken a stand on a particular issue that you share that stand or you wouldn't hold the office. But that is not, in my mind the same as standing up in public and advocating a position."

(transcript of proceedings, September 19-20, 1989, page 50)

Be that as it may, it is in the midst of that controversy that it was agreed that Mr. Goldhawk would take leave, with pay, from "Cross Country Checkup" until after the November 21, 1988 election.

Mr. Goldhawk's options: ACTRA or "Cross Country Checkup"

At first, the evidence was not crystal clear as to what Ms. Logan offered Mr. Goldhawk when they met on November 22, the day after the election. Was he required, as a condition of continuing to host "Cross Country Checkup," to resign his presidency of ACTRA or only to relinquish his responsibilities as chief spokesperson of ACTRA?

On November 22, Mr. Goldhawk, without the official approval, at that point, of his union, made a suggestion to his superior. He was prepared to give up his duties as public spokesperson of ACTRA, but remain its president, in order to accommodate the CBC. CBC was not interested. He was given the following alternative: keep his office in ACTRA or keep his job as host of his show, but not both in any shape or form.

Overall, the evidence shows that CBC neither requested that Mr. Goldhawk resign only part of his union duties in order to accommodate their Journalistic Policy nor agree that he should do so. In fact, CBC turned down that offer. Rather, CBC considered that Mr. Goldhawk was personally identified with a highly controversial subject that would be associated to his holding any office in ACTRA. Therefore, to satisfy the requirements of CBC's Journalistic Policy, he had to sever all ties with the management of the union if he were to resume his position as host of "Cross Country Checkup."

Mr. Goldhawk did not make a decision right away and decided to consult first with union officials and fellow journalists.

In the meantime, another meeting was held between Ms. Logan, Mr. Frame, Mr. Michael McEwen, Vice-President of English Radio representing CBC and, on the union side, Mr. Garry Neil, ACTRA's top bureaucrat, and Ms. Ann Medina, herself a journalist with CBC and Vice-President of ACTRA. Here is how Ms. Medina summarizes the discussion:

"There were, I guess, really two main focuses of discussion. One was whether it was, in fact, an ultimatum that had been presented to Mr. Goldhawk, and the second one was the CBC policy, whether that, whether their interpretation and application of it basically came down to [an] a priori ruling out anybody who is a journalist being the president of ACTRA.

There was also discussion in terms of the president's role as a spokesperson for ACTRA and there was some discussion in terms of, that CBC and, and Donna Logan did not feel that one could separate out those two roles - whether one wished to or one didn't wish to, it could not be done and that, so long as free trade was an issue in this country, that, yes, indeed, a journalist could not be president of ACTRA. I asked her how long would free trade, in her mind, continue to be an issue and she replied, oh, about nine or ten years.

I felt that then, in effect, said that (a) you couldn't have a president be a journalist for the next ten years, president of ACTRA, but that really was getting at, if it wasn't free trade, it would be something so that underneath it was this a priori position, this, this establishment that it would be inconsistent to have someone be a president of ACTRA and a journalist.

I disagreed with that, quite obviously. I expressed that disagreement. And I also expressed the position that one could be less of a spokesman and function as president because I certainly know that there are many, many, many, many things that a person can do at ACTRA as president that would take up a lot of time and be very important to that organization that had nothing to do with the role of being a spokesperson.

Q. Ms. Medina, whose, whose idea was it, or who expressed the, the potential for separating the positions of president and spokesperson?

A. I believe it was either Garry [Neil] or myself, in the sense that they were talking as if the two roles were one and the same. And we were talking as if, well, it would not be inconsistent. Again, the, the focus was whether there was this a priori, you know, ruling out, so that it would not be inconsistent in a situation for a person to be a president and not be front and center being the spokesperson on free trade publicly, at public forums. And that was when, I mean, I think it was in our search to be specific about what

kinds of cases would be possible which would then argue against the inconsistency."

(transcript of proceedings, December 12, 13 and 15, 1989, pages 110-111)

As a matter of fact, on November 23, 1988, Mr. Goldhawk tendered his resignation as ACTRA's president in the following terms:

"With great regret and sadness, I am submitting my resignation as President. The situation I face at the CBC is categorically simple; that I must choose between my ACTRA job and my hosting job. Faced with such an arbitrary situation, I had to choose to remain as a journalist.

I intend to submit a longer report to the next Executive meeting, at which time I would attend as an observer.

Would you please contact Sean Mulcahy and tell him he is to assume the Presidency in the interim at least until the Executive meets to deal with this situation.

Please give any members who might wish to talk to me about this situation, my shoe phone number.

Everyone is owed an explanation in this matter."

He told the CBC about his decision the next day and was soon called back as host of "Cross Country Checkup" which he still is to this date.

Here is how Mr. McEwen, CBC Vice-President, announced Mr. Goldhawk's decision in a press release dated November 24, 1988:

"CBC POSITION ON DALE GOLDHAWK

Our listeners expect CBC Radio hosts to be free of bias. In fact, our journalistic policy prohibits our hosts from taking positions on controversial issues.

Dale Goldhawk was president of ACTRA, a union which has publicly stated its opposition to free trade. That, in our view, placed Dale in a clear conflict of interest.

Dale's association with ACTRA does not contravene any CBC policy. His role as spokesman for an

organization that has taken a public stance on a controversial issue does contravene CBC policy.

This is a very clear policy, a policy of which Dale was aware.

We offered Dale a choice. He could resign as president of ACTRA or as host of Cross Country Checkup. He chose to resign his ACTRA presidency and we are delighted to have him resume his duties at CBC Radio."

ACTRA accepted Mr. Goldhawk's resignation but decided to grieve the matter and also to file this complaint. They later resolved, in the following terms, to leave vacant the position of President of ACTRA:

"Whereas Dale Goldhawk was forced to resign his position as President of this Alliance because of a perceived conflict of interest by the CBC, thereby affecting his freedom of speech in a democratic country;

Be It Resolved that the post of President be left vacant for the length of his normal term, as a form of protest."

The Journalistic Policy

CBC's Journalistic Policy is currently published in a 130-page manual divided in five sections: I: Principles and Standards; II: Method; III: Rights of the Public; IV: Specialized Program Forms; and V: Legal Aspects of Broadcasting.

It may be useful to present some of the most relevant provisions:

"JOURNALISTIC PRINCIPLES

The policies in this volume concern all information programs. These programs comprise news and all aspects of public affairs (political, economic, social) and include journalistic activities in science, arts, agriculture, religion, sports.

This is the programming through which the CBC provides the balanced and comprehensive service of information in English and French integral to

its mandate from Parliament. It must embrace the wide range of subjects of interest and consequence to Canadians - whether local, regional, national or international.

The CBC would inhibit itself seriously if, in the attempt to upset no one, to disturb no institution, it undertook to limit the comprehensiveness of its reporting of contemporary society. Equally, it is important to examine and keep before the public those positive aspects of our society as well as those which are being called into question, those trends or events which are important but may not be spectacular.

Policies are based on the premises and principles which follow these comments. They have arisen out of the Corporation's interpretation of its responsibilities under broadcast legislation as well as the wide experience and basic practices of our information programming staff for over half a century. Together with the integrity of staff they comprise the framework for CBC journalistic programs.

Policies are intended to be flexible enough to avoid unnecessary rigidity while stating clear lines of demarcation between the acceptable and unacceptable. Should uncertainty arise as to the application of any policy, the matter is to be referred to Directors of Information Programs or authorized delegates.

CBC program policy rests on certain premises, which distinguish the Corporation's philosophy:

- (a) The air belongs to the people, who are entitled to hear the principal points of view on all questions of importance;
- (b) The air must not fall under the control of any individuals or groups influential because of their special position;
- (c) The full interchange of opinion is one of the principal safeguards of free institutions;
- (d) The Corporation maintains and exercises editorial authority, control and responsibility for the content of all programs broadcast on its facilities;
- (e) The Corporation itself takes no editorial position in its programming.

These premises underlie all the program policies of the Corporation. Information programs must reflect as well established Journalistic Principles:

- Accuracy: the information conforms with reality and is not in any way misleading or false. This demands not only careful and thorough research but a disciplined use of language and production techniques, including visuals.
- Integrity: the information is truthful, not distorted to justify a conclusion. Broadcasters

do not take advantage of their position of control to in any way present a personal bias.

- Fairness: the information reports or reflects equitably the relevant facts and significant points of view; it deals fairly and ethically with persons, institutions, issues and events.

Application of these principles will achieve the optimum objectivity and balance which must characterize CBC's information programs. The ensuing policy statements demonstrate how the principles are applied in CBC information programming.

BALANCE

CBC programs dealing with matters of public interest on which differing views are held must supplement the exposition of one point of view with an equitable treatment of other relevant points of view. Otherwise, the information given would not be fair and comprehensive. Fairness is not simply achieved by a rigid neutrality or mathematical balance. Equitable in this context means fair and reasonable, taking into consideration the weight of opinion behind a point of view, as well as its significance or potential significance.

There are two kinds of balance and fairness in the handling of information programming, one provided by the journalists and the other provided by the CBC as a journalistic organization.

Journalists will have opinions and attitudes of their own. But the proper application of professional standards will prevent these opinions and attitudes from leading them into bias or prejudice. It is essential that their reporting is done in a judicious and fair manner.

...

Programs dealing with an issue of substantial controversy on a one-time basis should give adequate recognition to the range of opinion on the subject. Fairness must be the guiding principle in presentation, so that the audience is enabled to make a judgment on the matter in question based on the facts.

A program series must not adopt an editorial position supporting one side or another on a major controversial question, (for example, the question of 'conservation' versus 'technology'); although individual programs within the series may reflect a particular view, the series itself must give adequate consideration to differing views on such subjects.

Continuing news and current affairs programs must present a balanced overall view on controversial matters, so as to avoid the appearance of promoting particular opinions or being manipulated into doing so by events. Journalists, editors and supervisors must be aware of the necessity for

balance in their ongoing presentation of controversial matters.

...

PERSONNEL

On-air personnel, as well as those who edit, produce or manage CBC programs, have privileged access to an influential medium and therefore their performance is of critical importance for the maintenance of journalistic principles and the CBC's policies in relation to these principles.

In order to maintain their credibility, they must avoid publicly identifying themselves in any way with partisan statements or actions on controversial matters.

...

Hosts and Interviewers

Hosts and interviewers must treat their guests fairly. They should not be critical or demanding of some, while conciliatory and sympathetic to others.

It is also essential for the maintenance of their credibility that they refrain from personal advocacy, not only in their public statements but, as well, in their handling of discussions and their selection of questions.

...

CREDIBILITY

In an open society, an essential attribute of a journalistic organization is that both it and its journalists be perceived as credible by the public. Credibility is dependent not only on qualities such as accuracy and fairness in reporting and presentation, but also upon avoidance by both the organization and its journalists of associations or contacts which could reasonably give rise to perceptions of partiality. Any situations which could cause reasonable apprehension that a journalist or the organization is biased or under the influence of any pressure group, whether ideological, political, financial, social or cultural, must be avoided.

In the engagement and assignment of persons working in information programs, the organization must be sensitive to their published views, their personal involvements and their associations and backgrounds in order to avoid any perception of bias or of susceptibility to undue influence in the execution of their professional responsibilities."

(pages 5-21; emphasis added)

CBC's Journalistic Policy goes way back to its origins as Canada's national public broadcaster. This policy is described as the counterpart of CBC's particular status in Canadian broadcasting under the Broadcasting Act, R.S.C., 1985, c. B-9, which contains numerous provisions of interest to this case:

"3. It is hereby declared that

...

(c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;

...

(e) all Canadians are entitled to broadcasting service in English and French as public funds become available;

(f) there should be provided, through a corporation established by Parliament for the purpose, a national broadcasting service that is predominantly Canadian in content and character;

(g) the national broadcasting service should

(i) be a balanced service of information, enlightenment and entertainment for people of different ages, interests and tastes covering the whole range of programming in fair proportion,

(ii) be extended to all parts of Canada, as public funds become available,

(iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and

(iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity;

(h) where any conflict arises between the objectives of the national broadcasting service and the interests of the private element of the Canadian broadcasting system, it shall be resolved in the public interest but paramount consideration shall be given to the objectives of the national broadcasting service;

...

24.(1) There is hereby established a corporation to be known as the Canadian Broadcasting Corporation, consisting of a President and

fourteen other directors to be appointed by the Governor in Council.

...

29.(2) The Corporation may, on its own behalf, employ such officers and employees, in addition to the Executive Vice-President, as it considers necessary for the conduct of its business.

(3) The Executive Vice-President and the officers and employees employed by the Corporation pursuant to subsection (2) shall, subject to section 35, be employed on such terms and conditions and at such rates or remuneration as the Corporation deems fit and the Executive Vice-President and those officers and employees are not officers or servants of Her Majesty.

30.(1) The Corporation is established for the purpose of providing the national broadcasting service contemplated by section 3, in accordance with the conditions of any licence or licences issued to it by the Commission and subject to any applicable regulations of the Commission, and for that purpose the Corporation has power to

(a) establish, equip, maintain and operate broadcasting undertakings;

...

(c) originate programs, secure programs from within or outside Canada by purchase, exchange or otherwise and make arrangements necessary for their transmission;

...

(n) do all such other things as the Corporation deems incidental or conducive to the attainment of the purposes of the Corporation.

...

(3) The Corporation is bound by Parts I and II.

31.(1) Except as provided in subsection 29(3), the Corporation is, for all purposes of this Act, an agent of Her Majesty, and it may exercise its powers under this Act only as an agent of Her Majesty.

...

35.(1) The Corporation may make by-laws

...

(d) respecting the duties and conduct of the directors, officers and employees of the Corporation and the terms and conditions of employment and of termination of employment of officers and employees of the Corporation, including the payment of any gratuity to those

officers and employees or any one or more of them, whether by way of retirement allowance or otherwise;

...

(f) generally for the conduct and management of the affairs of the Corporation."

(emphasis added)

The Board allowed the filing as evidence of testimony given before the CRTC in 1977 by Mr. Marc Thibault, then head of News for Radio-Canada. In his opinion, the Corporation, in its capacity as national broadcaster, is distinct from private broadcasting organizations in many respects. This uniqueness of the CBC is, in Mr. Thibault's view, vested in its governing statute and it defines the conditions under which journalism is practised there (see exhibit #15, page 812). As Mr. Thibault explained:

"... C'est donc de la nature même de l'entreprise publique qu'est Radio-Canada que découle le statut de journaliste de la Maison. Ce statut s'est explicité progressivement dans nos politiques d'information. Ces politiques ont eu à se confronter à la dure réalité de la pratique à en faire et y ont trouvé illustration, confirmation et enrichissement.

L'impartialité du journaliste.

Ainsi, à ce chapitre, le réseau français a été battu en brèches, et dans un passé encore récent, comme peu d'entreprises de presse l'ont été.

Pourtant, le réseau français maintient depuis fort longtemps des exigences fondamentales à ce sujet. Il est interdit, il va de soi, au journaliste de la Société de se servir des ondes pour y promouvoir ses idées ou ses options personnelles, directement ou indirectement. Il lui est interdit de surcroît tout engagement extérieur -- au premier chef, il va de soi, l'engagement politique -- qui compromettrait la perception de son impartialité dans l'esprit du public.

Ce n'est pas à Radio-Canada qu'un journaliste-animateur mobiliserait les ondes pendant des semaines contre le gouvernement québécois ou contre le gouvernement canadien et leur législation linguistique. Ce n'est pas à Radio-Canada qu'un ancien chef politique créditiste ou un ancien candidat péquiste deviendrait animateur de ligne ouverte avec tout loisir d'un engagement personnel très poussé.

Ce n'est pas au réseau français non plus qu'un ancien ministre libéral se verrait confier l'animation d'une grande émission d'information. Ce n'est pas à Radio-Canada davantage qu'un 'columnist' réputé ou un éditorialiste chevronné serait invité à assumer en exclusivité la fonction d'éditorialiste-maison. Cela pourtant s'est vu et se voit ailleurs."

(exhibit #15, pages 813-814; emphasis added)

Appearing before the CRTC with Mr. Knowlton Nash, at that time his counterpart for the CBC, M. Thibault explained the organization's Journalistic Policy, particularly with respect to impartiality. Concerning the need for impartiality, Mr. Thibault testified about Radio-Canada's long-standing policy and safeguards against any risk of bias or perception of bias by the public. He told the CRTC about past occurrences involving the policy against the perception of bias.

He described how Mr. Gérard Pelletier, later to become Minister in the federal government, came to resign as co-host of a public affairs TV program called Les idées en marche. Mr. Pelletier was associated with the labour movement and perceived as a leftist by an organization, the Institut canadien d'éducation des adultes (ICEA), itself directly involved in the production of the show. Mr. Pelletier had long disassociated himself from any involvement in labour issues on his show. In the ICEA's opinion, this was not sufficient and the association required the addition of a third host to avoid any "ideological conflict." The CBC agreed, but Mr. Pelletier, who felt sufficient that he be impartial on the air, did not; he saw the rest as witch-hunting and resigned.

Another precedent cited by Mr. Thibault is that of Mr. René Lévesque, who later became Premier of Quebec. In the mid-

60's, Mr. Lévesque hosted a public affairs TV program called Point de mire. During a strike by the CBC producers, Mr. Lévesque's show was suspended and he joined a Montreal radio station as a commentator to earn a living. When the strike ended, CBC called him back to work and required that he give CBC the same exclusivity he had in the past. They considered that Mr. Lévesque's role as a commentator on a private radio station might bring the public to doubt his impartiality as a CBC host. He refused and resigned.

Mr. Thibault also cited the case of Mr. André Laurendeau, then editor of Le Devoir, later to be co-chairman of the Laurendeau-Dunton Commission. Mr. Laurendeau resigned as co-host of a public affairs program, L'événement, where he was not assigned to any national political issue because of his involvement with Le Devoir. Mr. Laurendeau resigned because the CBC did not want to loosen its policy on outside activities.

Mr. Thibault summarizes the CBC's policy as follows:

"... notre règle d'or: la perception par le public de l'impartialité de nos collaborateurs nous était tout aussi précieuse que cette impartialité même dans l'exercice de leurs fonctions à l'intérieur de nos émissions."

(exhibit #15, page 817)

Mr. Thibault's evidence was given in 1979 in the context of the then upcoming Quebec referendum where the CBC was under fire before the CRTC for a perceived lack of impartiality and the weakness of its journalistic standards.

Another case cited concerned a journalist who was let go because of outside activities as a writer with a monthly political magazine favourable to Quebec's independence.

Mr. Vince Carlin, called to appear before us, is quite familiar with the CBC's Journalistic Policy. He is the Managing Editor of National Radio News for CBC Radio. In the course of his long career in broadcasting, Mr. Carlin, himself a journalist, was called upon to host news programs, to be chief correspondent for CBC Radio, chief news editor, executive producer, parliamentary bureau chief, and assignment editor for CBC TV news. He was, at one time or another, part of management or a member of ACTRA or other unions dealing with the CBC. He currently holds a management position.

Mr. Carlin was involved in CBC's overhauling of its Journalistic Policy in the 1980's. He has been familiar with it from his first day with the Corporation in 1973. To his knowledge, it has not changed since and is best summarized as follows:

"Simply put, it is that journalists should not take public stands on matters of controversy. That's as simply as I can put it. ..."

(transcript of proceedings, September 19-20, 1990, page 81)

Mr. Carlin also explained the historical background of the policy issued in its current form in 1982.

CBC introduced in evidence copies of the Code of Ethics of other news organizations such as the BBC and NBC, CBS, ABC (in the USA), and the ABC (in Australia). No witnesses were called to explain them, but it is fair to say that they are less detailed than that of the CBC.

CBC adduced documentary evidence in the form of press clippings to demonstrate how CBC's position is difficult, particularly during election campaigns. In 1988, many

criticized the CBC for the way it handled news or current affairs, particularly the highly emotional free trade issue. Critics came from all sides and were numerous. Their most visible effect was to put the Corporation on the spot. In that sense, Mr. Lynch's column was one of many such criticisms, all of which rendered CBC's mandate even more difficult to deliver.

ACTRA also filed press releases putting CBC in the hot seat. These were more specifically centred on journalistic ethics and on Mr. Goldhawk's "treatment" by the CBC. They were of course a cause of concern for the Corporation. In the view of Alex Frame, these articles were also harmful to the CBC, and were in fact the result of Dale Goldhawk's article in ACTRASCOPE. Implied in his position is that had Mr. Goldhawk not written in ACTRASCOPE, all of this would not have happened.

Witnesses were called by ACTRA to comment on journalistic policies and ethics. One was Mr. Andrew Osler, associate professor of journalism at the Graduate School of Journalism at the University of Western Ontario. Also called by the union was Mr. Robert Fulford, himself a journalist and broadcaster.

Both these gentlemen's testimonies were objected to by counsel for the Corporation on the basis of relevance. The Board made it clear that at the end of the day, this matter could only be decided on the facts of this case and on our own legislation. The Board nonetheless allowed their evidence on the grounds that it had allowed CBC to introduce evidence of other organizations' Rules & Practices governing journalistic ethics. Their evidence was restricted to general considerations aimed at giving the Board an overview

of the ethical issues facing journalists as well as press organizations in today's world.

III

The Parties' Submissions

There is no need to recount the detailed submissions of both learned counsel. Let it suffice to say that they were well researched and strongly delivered.

ACTRA

According to the complainant, the Journalistic Policy of the CBC is equivalent to intimidation contrary to section 94(3)(a)(i) of the Code and constitutes direct interference with the union's internal affairs, contrary to section 94(1)(a). According to ACTRA, the reason for Mr. Goldhawk's forced resignation cannot be distinguished from his union activities as ACTRA'S president. ACTRA argues that the CBC has formally recognized that Mr. Goldhawk's performance on "Cross Country Checkup" was beyond reproach and totally satisfactory in all respects. ACTRA argues that there is therefore very little doubt that Mr. Goldhawk was forced to quit his position as ACTRA's president precisely and exclusively because of his association with ACTRA.

Since Mr. Goldhawk would be required to resign his position in ACTRA in order to keep his job as host of "Cross Country Checkup," CBC's position would also violate section 94(3)(a)(i), 94(3)(b) and 94(3)(e). ACTRA argues that as a union officer, Mr. Goldhawk is not only authorized by law to take positions on issues of concern for his membership, national or otherwise, but is expected to do so. In this case, Mr. Goldhawk addressed his membership in a union

newspaper and CBC's interference is in violation of the Code. According to ACTRA's counsel, the Journalistic Policy could not possibly have been violated because the article cannot be considered public. In counsel's opinion, Mr. Goldhawk cannot be held responsible or accountable for the fact that a member of ACTRA, Charles Lynch, chose to make that internal union position publicly known. For ACTRA, the CBC's position is tantamount to censorship and the fact that it led Mr. Goldhawk to leave his position within ACTRA is a clear violation of the Code.

Counsel mainly relied on the following case law authorities:

- (1) Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; and (1987), 87 CLLC 14,021
- (2) Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (1979), 34 di 651; [1979] 1 Can LRBR 266; and 80 CLLC 16,001 (CLRB no. 173)
- (3) American Airlines Incorporated (1981), 43 di 114; and [1981] 3 Can LRBR 90 (CLRB no. 301)
- (4) Canadian Pacific Air Lines Limited (1981), 45 di 204; [1982] 1 Can LRBR 3; and 82 CLLC 16,138 (CLRB no. 334)
- (5) Ottawa-Carleton Regional Transit Commission (1984), 56 di 203; and 7 CLRBR (NS) 137 (CLRB no. 475)
- (6) CFCN Television (a division of CFCN Communications Limited) (1988), 89 CLLC 16,008 (CLRB no. 719)
- (7) Québecair/Air Québec (1987), 72 di 44; and 88 CLLC 16,035 (CLRB no. 659)
- (8) Canada Post Corporation (1987), 71 di 215; and 87 CLLC 16,060 (CLRB no. 654)
- (9) Club 4H et la Revue Forêt Commerciale Inc. et al., [1980] 3 Can LRBR 382 (Que.)
- (10) Suzanne Clement, [1982] 2 Can LRBR 1 (Que.)
- (11) Neil Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; and (1985), 23 D.L.R. (4th) 122
- (12) Cashin v. Canadian Broadcasting Corporation et al. (1988), 88 CLLC 17,019 (F.C.A.)
- (13) Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; 78 CLLC 16,126 (CLRB no. 97)

- (14) Teskey et al. v. Canadian Newspapers Co. et al.
(1989), 68 O.R. (2d) 737 (C.A.)

CBC

Counsel for the CBC first alleged that in order for a complaint to be upheld under section 94(3)(a), the evidence must establish anti-union animus on the part of the employer. On the issue of animus, counsel argued that CBC's journalistic policy predates its recognition of ACTRA. According to counsel, CBC's only concern in the Goldhawk incident was compliance with its Journalistic Policy, the "golden rule" pertaining to the perceived objectivity standard. Counsel was of the opinion that the treatment Mr. Goldhawk received was no different from that given to other broadcast journalists involved in similar incidents in the past. In addition, counsel argued that Mr. Goldhawk had all but recognized that the events summarized earlier actually amounted to a violation of the CBC's Journalistic Policy. He further argued that Mr. Goldhawk actually felt constrained, in the circumstances, to withdraw from "Cross Country Checkup" and later to step down as President of ACTRA.

Counsel maintained that no inference of anti-union animus could be drawn from the facts, let alone be directly demonstrated. On the contrary, CBC's longstanding policy is confirmed in a series of arbitration awards which have consistently favoured the Corporation or its position:

- (1) Re A.V. Roe of Canada Ltd. and International Association of Machinists, Lodge 1922 (1954), 5 L.A.C. 1626 (Laskin et al.)
- (2) Re Toronto Star Ltd. and Toronto Newspaper Guild, Local 87 (1977), 15 L.A.C. (2d) 326 (Beck et al.)
- (3) Re Ottawa Citizen and Ottawa Newspaper Guild, Local 205 (1978), 19 L.A.C. (2d) 113 (Kennedy et al.)

- (4) Re Canadian Broadcasting Corporation and National Association of Broadcast Employees and Technicians, December 31, 1982 (P.C. Picher, Ont.)
- (5) Re Canadian Broadcasting Corp. and National Association of Broadcast Employees and Technicians (1973), 4 L.A.C. (2d) 263 (Shime et al.)
- (6) Le Syndicat de la fonction publique v. La Société Radio-Canada, no. 0-294, April 14, 1981 (R. Barakett)
- (7) Le Syndicat général du cinéma et de la télévision (C.S.N.) v. Denis Vincent et al., no. M-127 and M-128, February 25, 1972
- (8) Robert Mackay et le Syndicat général du cinéma et de la télévision v. La Société Radio Canada, no. M-107, October 19, 1971

With respect to section 94(1)(a), CBC argued basically that for a complaint to succeed, the evidence would have to show that the CBC's action was in one way or another related to Mr. Goldhawk's role within ACTRA. According to counsel, CBC's action was in no way discriminatory since it was consistently applied throughout the Corporation. Furthermore, because of CBC's statutory duty, the Corporation had no choice but to apply a strict rule of neutrality and of perceived neutrality to its journalistic personnel.

Counsel also relied on the following authorities:

- (9) The Committee for Justice and Liberty et al. v. The National Energy Board et al., [1978] 1 S.C.R. 369
- (10) Neil Fraser v. Public Service Staff Relations Board, supra
- (11) Ontario Public Service Employees Union et al. v. Attorney General of Ontario (1988), 88 CLLC 14,051
- (12) Maritime Employers' Association (1985), 63 di 69; and 12 CLRBR (NS) 18 (CLRB no. 540)
- (13) Grassy Narrows Indian Band and/or Grassy Narrows Education Authority (1989), as yet unreported CLRB decision no. 740
- (14) Yellowknife Housing Authority (1987), 72 di 1 (CLRB no. 656)

(15) Canada Post Corporation (1989), 5 CLFTR (2d) 69; and 89 CLLC 16,029 (CLRB no. 749)

It is noteworthy that the parties expressly stated through counsel that they did not invoke the Charter of Rights and Freedoms. Consequently, neither counsel addressed the Charter in their submissions.

IV

The Issue

We first need to clearly define the real issue before the Board. For opposite reasons, both counsel described it as being very broad.

According to ACTRA, the Board must, first, clearly state that CBC shall not, under the guise of journalistic policies, impose what counsel considers to be censorship of its journalists' union activities and, second, take a position on the merits of CBC's Journalistic Policy.

The Corporation is of the opinion that the Board is bound by CBC's Journalistic Policy which was found to be satisfactory to the CRTC. Counsel argues that CBC's independence and impartiality could be jeopardized if indeed the Board were to question the merits of the policy. In counsel's view, the Board should therefore confirm the correctness of that policy, in light of the national role of the CBC.

With respect to both counsel, such is not the issue we need to decide. What is in question is whether the Code was violated when, on or about November 22, 1988, Mr. Goldhawk

was asked to choose between his position as host of "Cross Country Checkup" and his position as President of ACTRA. That is the issue.

The Statutory Provisions

The provisions of the Code, ACTRA alleges were violated, are quoted above (pages 2-3), and there is no need to repeat them here. The same goes for the provisions of the Broadcasting Act, (pages 17-19, supra). Also relevant to this matter is section 8 of the Code under the title "Basic Freedoms":

"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

(2) Every employer is free to join the employers' organization of his choice and to participate in its lawful activities."

Finally, as we will see later on, the Preamble to Part I of the Code is also relevant.

"Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

And WHEREAS Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

And Whereas the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;

And Whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best

interests of Canada in ensuring a just state of the fruits of progress to all..."

V

THE MOTION TO DEFER TO ARBITRATION

Section 98(3) (page 3, supra) allows the Board to refuse to hear and determine a complaint that could, in its opinion, be deferred to arbitration. Since the incidents we are seized with have been grieved by ACTRA, and since these incidents deal with journalistic policy, counsel for the CBC argued that the whole issue falls within the collective agreement and should be deferred accordingly.

The Board has set out the criteria governing the exercise of its discretion under section 98(3) in Bell Canada (97), supra. (See also Bank of Montreal (Devonshire Mall Branch) (1982), 51 di 160; and 83 CLLC 16,015 (CLRB no. 404); Loomis Armored Car Service Ltd. et al. (1983), 51 di 185 (CLRB no. 408); Canada Post Corporation (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426); Canada Post Corporation (1989), as yet unreported CLRB decision no. 729; Canada Post Corporation (1989), as yet unreported CLRB decision no. 772; and Canada Post Corporation, as yet unreported CLRB decision no. 800).

In addition to the more "technical" criteria for deferring to arbitration, consideration must also be given to the statutory framework of the Code and the necessity to preserve it. After having considered the matter, we do not find that it would be appropriate to defer the present case to arbitration. Some aspects of this case raise serious statutory issues that could not be properly or totally

addressed in arbitration. For that reason, the motion to defer to arbitration is denied.

VI

THE MERITS

1. The Burden of proof:

In the case of an alleged violation of section 94(3), section 98(4) of the Code (page 3, supra), imposes on the employer the onus of establishing that the action it took was not contrary to the Code.

This rule governing burden of proof applies to all the allegations of the complainant except those made under sections 94(1)(a) and 96 (see Télévision Saint-François Inc. (1981), 43 di 175 (CLRB no. 306); A & M Transport Limited (1983), 52 di 69 (CLRB no. 422); Rapide Transport Inc. (1986), 64 di 135 (CLRB no. 561); and Cablevision du Nord de Québec Inc. (1988), 73 di 173 (CLRB no. 681)).

The reason for section 98(4) is simple. It is not always easy for an employee who is the victim of an alleged unfair labour practice to establish the illegality of the reasons for which management has made its decision. Conversely, an employer who takes a decision affecting an employee should not only be in a position to explain it, but also to justify it rationally and legally.

It is well established in law that where a violation of section 94(3) is alleged, the employer must demonstrate that through an otherwise legitimate decision, it did not use a genuine problem to penalize or otherwise discriminate against someone because of his union activities.

"... To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is one contemplated by section 184(3), he will be found to have committed an unfair labour practice."

(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 285; and 461)

2. The Motive Requirement:

a) Under the prohibition of s. 94(1)(a)

That provision deals with management interference in union affairs. It is not necessary for a complainant to succeed under section 94(1)(a) to establish an anti-union animus or an intention to discriminate on the part of the employer. Indeed, that provision calls for an objective test first concerned with the effect of the employer's actions on the legitimate rights of employees or their unions. On the other hand, it does not impose the burden of proof on the employer.

The Board first took that objective approach in Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (173), supra, where a "balancing test" was outlined:

"If anti-union animus were not an element of a section [94(1)(a)] violation then the Board would have to balance legitimate union, employee and employer interests in any given case. On the one side would be the business justification or significant or legitimate reasons for the employer's conduct. On the other would be the individual employee or union pursuit of rights and freedoms under the Code. These would have to be assessed in the realistic light of the adversarial economic conflict of collective bargaining as the

Board did in The Royal Bank of Canada, Kamloops and Gibsons Branch, supra, where the employer's actions were justified by legitimate collective bargaining interests. In some marginal cases where the balance is equal motive may be a determinative factor."

(pages 671; 281; and 351)

This reasoning was followed by the Board in subsequent decisions: Bell Canada (1981), 42 di 298; [1981] 2 Can LRBR 148; and 81 CLLC 16,083 (CLRB no. 292); Canadian Pacific Air Lines Limited, supra; Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (173), supra; Bernshine Mobile Maintenance Ltd. (1984), 56 di 83; 7 CLRBR (NS) 21; and 84 CLLC 16,036 (CLRB no. 465); Ottawa-Carleton Regional Transit Commission, supra, Canadian Imperial Bank of Commerce (1985), 60 di 19; 10 CLRBR (NS) 182; and 85 CLLC 16,021 (CLRB no. 499); Canadian Pacific Limited (1985), 60 di 131 (CLRB no. 510); Canadian Pacific Air Lines Limited, supra; and Okanagan Helicopters Ltd. (1985), 62 di 21; 10 CLRBR (NS) 385; and 85 CLLC 16,037 (CLRB no. 521).

If there is no evidence of anti-union animus on the part of the employer, the above case law makes it clear that not every difficulty encountered by a union in its formation or administration stems from a violation of section 94(1)(a). Thus, "apparent interference" by the employer or, to use the Ontario Labour Relations Board's words, "employer conduct that only incidentally affects a trade union" (A.A.S. Telecommunications Ltd. and Zipcall Ltd., [1976] OLRB Rep. Dec. 751 at page 758) would not constitute the kind of problem contemplated by section 94(1).

"... If that were so, the mere resistance to union demands could be construed as interference. The cases have indicated that where the employer's actions are not tainted by anti-union animus there is a balancing between the interests of employers on the one hand and of unions and employees on the other. ..."

(Bernshine Mobile Maintenance Ltd., supra, pages 91; 29; and 14,312)

When balancing competing interests, the Board does not look for a specific management interest to counterbalance the adverse impact on union activity. Rather, it looks for a "sufficient or legitimate managerial, entrepreneurial, or collective bargaining justification" (Claude H. Foisy et al., Canada Labour Relations Board Policies and Procedures, Toronto, Butterworths, 1986, at page 386). The interests of both sides are assessed in the "realistic light of the adversarial economic conflict of collective bargaining" (Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (173), supra, pages 671; 281; and 351). In cases where the balance is equal, motive becomes the determining factor (Wardair Canada (1975) Limited (1983), 53 di 26; and 2 CLRBR (NS) 129 (CLRB no. 409)).

What is a legitimate management interest?

Let us first say that many cases have to do with bans on union activities on the employer's premises, namely soliciting membership on the job. In Ottawa-Carleton Regional Transit Commission, supra, the Board reaffirmed its policy (established in Bell Canada, August 22, 1975 (LD 19)) that:

"... the 'only with compelling and justifiable business reasons' restriction against employer prohibition of the lawful right of employees to solicit membership in the trade union of their choice amongst fellow employees, even if that right is exercised on the employer's premises during non-working hours, best strikes that delicate balance between the competing interests

of the employees and an employer's managerial and entrepreneurial interests."

(pages 216; and 151; emphasis added)

"Compelling or justifiable reasons", in the context of restricting lawful union activity such as the wearing of a union insignia on the job, could include "the ability to show a detrimental effect on entrepreneurial interests such as, negative customer reaction, security, safety or other business considerations" (Ottawa-Carleton Regional Transit Commission, supra, pages 218; and 153-154). Such detrimental effect on entrepreneurial interests "must be real and constitute more than a minor annoyance or inconvenience" (Ottawa-Carleton Regional Transit Commission, supra, pages 219; and 155).

The Ottawa-Carleton Regional Transit Commission, supra, case is interesting as it reviews the no-solicitation cases which are most representative of this balancing of interest approach.

The OLRB initially developed two different approaches to section 64 of the Labour Relations Act (the equivalent of section 94(1)(a) of the Code), the "non-motive approach" and the "motive requirement approach". Both were analyzed at length by George Adams, then Chairman of the OLRB, in International Wallcoverings, Division of International Paints (Canada) Ltd., [1983] OLRB Rep. Aug. 1316; and [1983] 4 Can LRBR (NS) 289.

After a thorough review, he concludes as follows:

"... Both approaches involve some balancing; both take into account the scheme of the Act; and, without direct evidence of motive, both approaches in effect require a considerable imbalance of

interests in favour of the protected activity before a violation will be established. ..."

(International Wallcoverings, supra, page 312; emphasis added)

In the end, the Ontario Board disapproved the motive approach because it could deprive the statute of the flexibility necessary to respond to certain situations such as those "where employer conduct has a significant impact on protected activity and, while supported by good faith, does not reflect a persuasive or worthy business purpose" (International Wallcoverings, supra, page 313).

A review of the Ontario regime shows that the "balancing approach" ties the outcome to the weight given to one aspect of the issue as opposed to others.

In 1985, George Adams, no longer at the helm of the Ontario Board, published his book Canadian Labour Law, Aurora, Canada Law Book Inc., (1985). Talking about the no-solicitation cases, he writes:

"... the no-solicitation cases have looked to identify the managerial interest in a sweeping no-solicitation rule over and above a simple reliance on property rights. Where such an interest is absent, a significant imbalance in interest can be found to exist and a violation of the statute may be found. In these situations, the board may or may not formally conclude its findings by inferring an intent to interfere. The requirement of a fictional intent demonstrates that labour boards, in this area, are engaged in a balancing of interests but on a very restricted basis. They will only intervene where there is little or no business justification for the imposition of the no-solicitation rule."

(Canadian Labour Law, supra, page 494; emphasis added)

Keeping in mind that most Ontario cases involving a balancing test dealt with solicitation bans, in contrast, the CLRB case law has come up with quite a different test

in cases of the same nature and has developed a somewhat different approach where the union activity involved is not solicitation on the employer's premises.

In Maritime Employer's Association, supra, a case not concerned with solicitation, the Board stated that:

"... Save in exceptional circumstances and for very serious reasons, the rights conferred in [s. 8] will definitely take precedence. The prohibitions under [s. 94(1)(a)] close the door to any other interpretation. ..."

(pages 92; and 41; emphasis added)

In that case, the employer had refused to participate in any meeting with Mr. Beaudin, the Union President, and had banned him permanently from all its offices and premises. It also refused to deal with Mr. Beaudin over the phone or by mail. The employer justified its decision on the fact that the complainant had physically attacked one of its representatives during a meeting. After having found that Beaudin had indeed assailed an employer's representative without provocation during a joint union employer meeting, the Board dismissed the complaint with respect to the denial of access to the employer's premises, but upheld it with respect to other means of communicating. The Board went back to the test set out earlier in Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (173), supra, as follows:

"... It requires a close causal relationship between the employer's reason and action. In other words, to be considered legitimate, the measures to which the employer resorts must be strictly warranted by the facts that brought them on. Anything less might in fact induce an employer to take advantage of a situation and act well beyond what is really called for and thus flout the rights of the union and the employees."

(Maritime Employers' Association, supra, pages 91-92; and 41)

The Board found that the employer could not refuse to deal with the union president over the phone or by mail given that no legitimate reason could justify such a refusal.

Later, the Board in CFCN Television (a division of CFCN Communications Limited), supra, stated at page 14,075 that "as far as the terms of section 94(1)(a) (previously section 184(1)(a)) are concerned, the Canada Labour Code takes precedence over any employer rule."

In brief, under the Canada Labour Code, an employer's actions that actually interfere with employee solicitation on the job will indeed be subject to a balancing test and will be found illegal pursuant to section 94(1)(a) unless compelling and exceptional circumstances justify such bans. Other kinds of employer's decisions that actually interfere with the rights protected under section 94(1)(a) will be assessed on the basis that the Code takes precedence over any employer rule (see CFCN Television (a division of CFCN Communications Limited), supra).

b) Under the prohibition of section 94(3)(b)

The unfair practice of entering into "yellow-dog" contracts, prohibited by section 94(3)(b), is also concerned with effects and does not require the evidence of a motive. It is the act itself which is prohibited (Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches (173), supra).

- c) Under the prohibition of sections 94(3)(a)(i), 94(3)(e) and 96

Contrary to the law under sections 94(1)(a) and 94(3)(b), motive or anti-union animus is an essential ingredient of a violation of sections 94(3)(a)(i) and 94(3)(e) (pages 2-3, supra) because "absent this discriminatory motive the actions fall within the employer's managerial prerogative and Part V of the Code addresses only limited issues" (Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (173), supra, pages 671; 281; and 351).

The Board can infer anti-union animus when the employer does not offer any reasonable explanation for the conduct subject to the complaint (see Canadian Labour Law, supra, pages 491, 492 and 495).

Finally, section 96, the general prohibition, is also to be read in this context and also requires that anti-union animus be present even though, for no visible reason, Parliament did not see fit to include section 96 under the umbrella of the rule of proof set out in section 98.

3. Analysis:

In order to determine whether there was a violation of sections 94(1)(a) and 94(3)(a)(i) and 96 of the Code, the following three (3) points will be analyzed:

- a) Was Mr. Goldhawk engaged in a lawful union activity contemplated by the Code when he signed his article in ACTRASCOPE?

- b) Was the choice given to Mr. Goldhawk by CBC to choose between keeping his position as president of ACTRA or keeping his job as host of "Cross Country Checkup" tainted with anti-union animus?
- c) If not, with respect to section 94(1)(a), did CBC's Journalistic Policy constitute a valid justification, given the effect its decision had on the freedom of Mr. Goldhawk to be an officer of ACTRA and on ACTRA's right to organize itself and to represent its members without interference?
- a) Was Mr. Goldhawk engaged in a lawful union activity contemplated by the Code when he signed his article in ACTRASCOPE?

The right to participate and hold responsibilities in the administration of a trade union is certainly one of the most important aspects of the freedoms entrenched in section 8(1) and protected by section 94(1)(a) of the Code. Its corollary is the union's right to choose its own officers without interference and to entrust them with the responsibilities it finds appropriate to attain its goals (Maritime Employers' Association, supra). As the Board stated in Canadian Pacific Air Lines Limited (1985), 61 di 140; and 10 CLRBR (NS) 62 (CLRB no. 520), section 94(1):

"... is also directed at leaving the union free to operate and to do its job on behalf of the persons it represents without improper meddling by the employer in matters that are primarily the concern of the union, meddling that would have the effect of undercutting or weakening the union."

(pages 155; and 77)

Section 94(1)(a) "cannot serve as an umbrella for all union activities regardless of their merits." (Brazel Transport Inc. (1979), 35 di 163 (CLRB no. 210), page 166). But what exactly did Mr. Goldhawk do? As spokesperson of his union, he signed an article in a union newsletter.

Since it is alleged that it is not strictly Mr. Goldhawk's association with ACTRA that prompted CBC's actions, but rather the fact that his involvement in a controversial issue became public, the Board must decide whether ACTRA as a union and Mr. Goldhawk as a union official are entitled to statutory protection in this situation. In other words, are a union and its officers entitled, under section 8(2) of the Code, to publish in a union newsletter an article on a subject they consider important and will they enjoy the protection of section 94(1)(a)?

Case Law

Under its by-laws, ACTRA's president is the organization's chief spokesperson. As a regular union activity, ACTRA publishes ACTRASCOPE which is for all intents and purposes aimed at its membership. Similar to other organizations producing a newsletter, ACTRA's president regularly addresses the union members through a column published in ACTRASCOPE. We have therefore before us a union official addressing its members through a print media owned and controlled by the organization. We have found no direct authority on the rights of unions to publish internal union bulletins as opposed to resorting to the public media.

The Board has stated in four decisions that declarations to the media by a union official are part of union administration and representation (Canada Post Corporation

(654), supra; Québecair/Air Québec (1987), 72 di 44; and 88 CLLC 16,035 (CLRB no. 659); Canada Post Corporation (1988), 88 CLLC 16,064 (CLRB no. 716); and Wardair Canada Inc. (1988), 89 CLLC 16,009 (CLRB no. 722)). However, this right is not an absolute right and must be exercised within certain limits. These limits are not predetermined; they depend on the facts of each case (Wardair Canada Inc., supra). In the instant case, Mr. Goldhawk's article was published in the union's newsletter and was aimed at a limited union readership. It seems reasonable to assume that under the Code a union president may at least say to his troops verbally or in writing what he can say to the public at large.

In Canada Post Corporation (no. 654), supra, the complainant was the Vice-President of the Maritime Branch of the Canadian Postmasters and Assistants Association. She was suspended for five days for having expressed, while speaking before a public body, her opinion on the negative effects of the Canada Post Corporation Plan on rural services and the potential loss of jobs that could result.

Her criticisms, which were made during collective bargaining, were not directed to her employer but to government policy, in the hope that the public would exercise pressure on the MPs. Her ultimate goal was job security for the union members, a key if not the key issue at the bargaining table. Her public statements were reported by the local newspaper and brought to the attention of her employer.

Canada Post's position was that public criticism from any of its employees could not be tolerated and that only authorized company executives could take public positions.

The "Employee Code of Conduct" provided for the following rule:

"Employees, unless authorized and/or acting in the normal course of their employment, are not to take part in any public discussion regarding the corporation."

(page 5)

In that case, the Board reviewed adjudicators' decisions dealing with the right of public servants to criticize the Government (ref: Neil Fraser v. Public Service Staff Relations Board, supra; William Chedore and Treasury Board, no. 166-2-9320, November 19, 1980 (PSSRB); Arthur J. Stewart v. Public Service Staff Relations Board, [1978] 1 F.C. 133). It also reviewed private sector arbitration cases. Finally, the Board concluded that "the right of an employee to speak out against his employer is not as restrictive in the private sector as it is with regard to public servants" (page 12).

Mr. Goldhawk is not a public servant, as is expressly stated in section 29(3) of the Broadcasting Act (supra, page 19). In that sense, his labour relations, much like those of Canada Post's employees, are governed by the same statutory provisions under the Code as are those of others working for private broadcasters.

The Board defined in Canada Post Corporation (654), supra, the notion of "representation" found in section 94(1)(a):

"The term 'representation' as it is used in section [94(1)(a)] is not defined anywhere in the Act. It is incumbent upon the Board to give it meaning and substance."

We are of the view that it should not be interpreted restrictively and that 'representation of employees by a trade union' includes not only representations to the employer, but to the public

as well and in any forum where the union feels it is in the interest of its members to do so."

(Canada Post Corporation (654), *supra*, pages 228; and 14,461-14,462; emphasis added)

Accordingly, the Board found that Samson's public statements were indeed part of "representation of employees by a trade union" and were protected by section 94(1)(a) because they were made in the course of her duties as union representative, and were not intentionally malicious or reckless.

The Board dismissed the employer's suggestion that the right of the union to address the public could be limited to the union's full-time staff:

"The employer cannot tell the union how it is to administer itself. It is up to the union to determine how it is going to represent its members. If the members feel that they are not adequately represented, then they will tell their executive and they will cause the changes to be made. In the instant case, the CPAA represents approximately 10,000 members spread right across the country in literally thousands of locations. In many locations, there is only one member. The maximum number of members at any one location is seven. The CPAA has organized itself in the manner in which it feels it can best serve its membership, and the Corporation has no right, directly or indirectly, to tell it otherwise."

(Canada Post Corporation (654), pages 228-229; and 14,462; emphasis added)

The Board also rejected Canada Post's argument that the union officer's right to speak out could only be exercised on special occasions and subscribed to the OLRB decision in The St. Catherines General Hospital, [1982] OLRB Rep. March 441:

"... We specifically reject the notion that statements must be 'timely' to be even considered as trade union activity. Conduct giving rise to this type of problem can reasonably arise during an organizing drive; during negotiations; during grievance meetings; and on other ad hoc occasions. A collective bargaining relationship is an ongoing

relationship. The adoption of timeliness considerations in analyzing alleged union conduct would create artificial rules quite inconsistent with the dynamics of collective bargaining."

(page 481)

The Québecair/Air Québec, supra, case deals with an unfair labour practice complaint filed after a union spokesperson was dismissed following a statement made to the media during a lawful strike. Mrs. Fugère had declared to the media that flight attendants were joining a strike by ground workers out of concern for their own safety and that of the travelling public. The employer who had a clear policy against employees making any kind of public statement dismissed her.

The Board subscribed to the basic principles established in the Canada Post Corporation (no. 654), supra, case, and noted that a strike situation gives even more latitude to union officials.

"... The panel of the Board that heard and decided Canada Post Corporation (654), supra, recognized that there are limits to this freedom of expression and that these limits are exceeded where there is intent to harm or reckless conduct. We subscribe to this view, with the qualification that a strike and a collective bargaining situation make it even more difficult to punish an employee for making a public statement because, as we know, a strike is by definition a hostile act."

(Québecair/Air Québec, supra, pages 59; and 14,250)

The third case involved Canada Post. In Canada Post Corporation (716), supra, in October 1987, the President of a local of the Letter Carriers' Union of Canada (LCUC) was suspended after making critical comments before the Coquitlam, B.C., municipal council about CPC's policies in respect of door-to-door mail delivery and "super boxes."

His declaration was part of a campaign where "local and national officers were among those who undertook to spread [the] message to politicians and the public" that super mail boxes would lead to door-to-door delivery being abandoned (Canada Post Corporation (716), supra, page 14,446).

It is useful to quote in part the letter of suspension CPC sent to its employee:

"This will confirm the formal interview, held at the Port Coquitlam Letter Carrier Depot, October 29, 1987.

...

The subject of this interview was the presentation you made to the Coquitlam Municipal Council regarding Canada Post Corporation Policies and Direction, on October 05, 1987.

During the interview you stated that you appeared before Council as an elected Representative of the Letter Carriers Union of Canada, Local 172, Port Coquitlam and that Council clearly understood your bias in regard to the subject.

You also stated that you feel you have the right to publically [sic] make these statements for the betterment of your Union, Community and in the long run, Canada Post.

I stated during the interview and will reiterate [sic] that it is Managements position, that it is not your place to publically [sic] espouse views that are contrary to Corporation Policy.

...

This statement is not only inaccurate, it is extremely damaging to the publics confidence in the Corporations ability to deliver.

Due to the fact that you took it upon yourself to publically [sic] espouse views that in at least 2 cases were misleading or offensive, and inaccurate as well as damaging to the publics [sic] confidence, I have no alternative but to suspend you from duty for a period of five (5) working days."

(Canada Post Corporation (716), page 14,448; emphasis added)

Here is how the Board summarized the issue:

"The fact is that Mr. Kucey did engage in a degree of exaggeration in order to sell LCUC's point of

view to the council. We would be hard-pressed not to say the same about Canada Post's effort to sell us the idea that in suspending Mr. Kucey it did not violate the Canada Labour Code.

We were asked to see some or all of Mr. Kucey's statements as:

- offensive, false, untrue, inaccurate and misleading;
- disparaging to the image of Canada Post;
- having the effect of undermining public confidence in CPC;
- having been made in reckless and/or negligent disregard as to their accuracy;
- being inconsistent with the duty of fidelity owed to an employer;
- being purely political and not protected as collective bargaining activities;
- blatant and outright misrepresentation;
- in bad faith;
- verbal vandalism;
- malicious;
- reckless;
- designed to humiliate and discredit;
- intentional misrepresentation designed to trick the public and malign the employer."

(Canada Post Corporation (716), page 14,449)

The Board upheld the complaint. Relying on Canada Post Corporation (no. 654), the Board set out additional guidelines to a union officer's right to speak publicly.

"It is clear that the policy expressed in the 'Samson' decision would not operate, however, without certain qualifying factors or limitations. Obviously a union officer would not be protected by the Code in respect of everything he or she might say publicly.

It would have to be relevant to the policies, interests and concerns of the union as such, although it would not have to be something virtually scripted by the union and followed slavishly by the officer. The protection of the Code would not extend to a union officer who used his or her position to make public comments concerning an employer in furtherance of a

personal or other objective which could not be linked to the interests of the collectivity. ..."

(Canada Post Corporation (716), supra, page 14,450; emphasis added)

That decision of the Board was upheld by the Federal Court of Appeal (Canada Post Corporation v. Letter Carriers' Union of Canada et al., judgment rendered from the bench, no. A-1180-88, June 21, 1990). We share the following comment made by the Board and consider it is applicable in the instant case:

"In the final analysis, when it comes to a question of what in this whole affair did greater damage to the reputation of the post office, the Board is inclined to feel that it was more the post office's reaction to Mr. Kucey's statements than those statements themselves. ..."

... We have no doubt that Mr. Kucey's appearance before, and presentation to, Coquitlam council took place in the line of his duty as a union officer and constituted 'representation' within the meaning of section 184. As for his statements themselves, we do not believe they can in any way be characterized in the kinds of terms referred to in the cases just cited. Nor do the overheated adjectives extracted from the employer's various submissions and summarized on pages 12 and 13 describe accurately the real nature of his comments. These may well define what would be found to be beyond the line and outside the protection of the Code in some future case. ..."

(Canada Post Corporation (716), supra, page 14,451; emphasis added)

Those statements, which according to courts and arbitration boards, would be considered to be "beyond the line" and "outside the protection of the Code," would be characterized as follows:

- "extreme" (the Supreme Court of Canada in Neil Fraser v. Public Services Staff Relations Board, [1985] 2 S.C.R. 455; (1985), 63 N.R. 161; and (1985), 9 C.C.E.L. 233)
- "false and very unfair" (arbitration board in Re Amoco Fabrics Ltd. and Amalgamated and Textile Workers Union, Local 1606 (1984), 17 L.A.C. (3d) 425 (O'Shea))

- "in reckless disregard of the truth" (the court in Montefiore Hospital and Medical Centre v. National Labour Relations Board (1980), 621 F.2d 510)
- "blatantly false", "obviously damaging to the respondent's reputation", "made maliciously", "in reckless disregard of the truth" (the National Labor Relations Board in Stanley Furniture Company and United Electrical Radio and Machine Workers of America (1984), 1984-85 CCH NLRB 28,379)

(see Canada Post Corporation (716), supra, pages 14,450-14,451

A third case is Wardair Canada Inc., supra. In this case, the complainant, who was a member of the local executive and member of the national and local Women's Committees of her union, filed a complaint of discrimination before the Canadian Human Rights Commission on behalf of the union against her employer.

She then released a copy of her complaint to the Globe & Mail and was interviewed by a reporter of the Toronto Star. Following the publication of these articles, she was suspended for two weeks and filed a complaint with this Board.

The majority of the Board dismissed the complaint after having reviewed its jurisprudence and found that the context in Wardair Canada Inc., supra, was very different from the context in Canada Post Corporation (654), supra, and Québecair/Air Québec, supra. In particular, the Board found that the complainant's conduct was isolated from the collective bargaining process and did not relate to any strike situation. The complainant was not a member of the bargaining committee and the women's issues were not the object of a dispute.

The majority considered the NLRB decision in Cincinnati Suburban Press, Inc. (1988), 289 NLRB 127, page 33,906; and

129 LRRM 1033, page 1035) where another limit to the union officer's right to speak out was characterized as the notion of disloyalty to an employer. There, the editor of a newspaper suspended and then discharged a reporter who had written in another publication about a union's unsuccessful campaign to organize editorial employees. The NLRB upheld the complaint. The employer had based its decision on Rules 18 and 29 of its internal regulations which prohibited:

"18. Making false, vicious or malicious statements concerning any employee, supervisor, the Company, or its product.

29. Unlawful, improper or unseemingly conduct on or off the Company premises or during non-working hours which affects the employee's relationship to his/her job, to his/her fellow employees or to his/her supervisors, or affecting the Company's product reputation or goodwill in the community."

(page 1033 (LRRM))

The NLRB reinstated the employee and had this to say about an employer's power to adopt rules, such as Rules 18 and 29 cited above:

"... the Respondent may adopt rules in which the content of the rules is necessary to the credibility of the institution and/or the quality of its product, and the rules themselves are narrowly tailored, unambiguous, and designate the category of employees to whom the rules are applicable; provided, however, that such rules do not improperly impinge on the relevant rights of the affected employees. See Peerless Publications, 283 NLRB no 54 [124 LRRM 1331] (Mar. 26, 1987)."

(footnote no. 2, pages 1033; and 33,903-33,904; emphasis added))

The NLRB found that the applicant's article was a union activity protected by the NLRA and that it was not so disloyal, reckless or maliciously untrue so as to lose the Act's protection.

This final comment by our American counterpart has some similarity to a finding of the Ontario Court of Appeal in Cadillac Fairview Corp. Ltd. et al. v. R.W.D.S.U. (1989), 71 O.R. (2d) 206 (C.A.). Here is how the facts were summarized by the court reporter:

"During a certification drive to organize employees of a large department store which was a prime tenant of a shopping centre, union organizers made approaches to employees and distributed leaflets within the shopping centre near the store entry. There was no employee access point to the employer's store other than through the shopping centre. On several occasions when organizers appeared outside the store's premises in the shopping centre, security personnel evicted them. The union brought an unfair labour practice complaint, alleging violation of s. 64 of the Labour Relations Act, R.S.O. 1980, c. 228, which prohibits interference in the formation or selection of a trade union by an employer or a person acting on behalf of an employer. The complaints were brought against the company holding the head leasehold interest in the mall (T), which was owned 20% by the store whose employees were being organized and 60% by a second respondent to the complaint, CF. Day-to-day management of the shopping centre rested with CF. The board found that the two companies, T and CF, were "persons acting on behalf of an employer" within s. 64 and ordered access for union organizers. An application for judicial review of the decision was dismissed."

(pages 206-207)

The Board had to choose between Cadillac's fundamental right to prohibit trespassing and the employees' statutory fundamental right to organize. After balancing each party's interest, the Board found in favour of the union. The High Court, which had upheld the Board's decision (Cadillac Fairview Corp. Ltd. v. R.W.D.S.U. (1987), 62 O.R. (2d) 337), was itself upheld by the Appeal Court. The Appeal Court found as follows:

"It is fundamental to the policy underlying the Labour Relations Act that employees have a right of self-organization and participation in lawful union activity. Section 3 guarantees that:

3. Every person is free to join a trade union of his own choice and participate in its lawful activities.

For those rights to be meaningful, it is manifest that employees must have access to union communications and opportunities for organizational activity. Having given employees the right to decide for themselves whether or not to join a union, the legislature can be assumed to have intended that they be permitted to make a free and reasoned choice. Such a choice necessarily implies that employees have access to union information free from restrictions that unduly interfere with the flow of information or their freedom of choice. The legislature can also be assumed to have recognized that the organizational rights guaranteed by s. 3 may come into conflict with traditional property and commercial rights in a variety of situations."

(pages 217-218)

With the exception of the decision in Canada Post Corporation (654), supra, all the cases cited from this Board deal with public statements aimed directly at the employer. Although the right of union officers to speak out in public against their employer is to be determined on a case by case basis, it appears clear that such a right flows from the Code and that, regardless of the rules set out by employers, union officials acting in good faith can expect statutory protection that is not necessarily granted to all employees.

While of interest, that jurisprudence is nonetheless of limited interest in this case since Mr. Goldhawk's article was published in a union paper aimed at its membership in a context where he was gathering support within the union for a position it had officially adopted. To find otherwise would imply that we question the right of the union to take that position in the first place, an argument that has not even been raised before us.

The Preamble of the Code

For the majority, in view of the Preamble of the Code, Canada's international commitments enlighten the right of union officials to express their concerns on issues considered by unions to be in their best interest.

Canada is a signatory of the "Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise" and a member of the International Labour Organisation. Reference to that international instrument is particularly relevant when interpreting the Code, since the Preamble to the Code expressly refers to it (supra, page 30).

Here are a few excerpts from Convention No. 87:

"Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

...

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

...

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organized collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention."

(pages 326-327; emphasis added)

The I.L.O. set up the Committee on Freedom of Association in 1951 for the application of the Treaty. It has since studied over 1300 cases concerning complaints about alleged violations in the countries signatories of the Treaty, including Canada. In a publication entitled Freedom of Association, Geneva, International Labour Office, 1985, which summarizes the Committee's findings, we can read:

"The Committee, having dealt with more than 1,300 cases since it was set up in 1951, has gradually taken a series of decisions covering most aspects of freedom of association and the protection of trade union rights."

(page 2)

Under the heading "General principles", the Committee found:

"68. A genuinely free and independent trade union movement can only develop where fundamental human rights are fully respected and guaranteed.

69. In the view of the Committee, a system of democracy is fundamental for the free exercise of trade union rights.

70. Trade union rights can only be exercised in a climate that is free from violence, pressure or threats of any kind against trade unionists; it is for governments to ensure that this principle is respected.

...

73. Recalling that, under the terms of Article 8 of Convention No. 87, workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land, provided that the law of the land shall not impair the guarantees provided for in the Convention, the Committee has nevertheless expressed the opinion that a free trade union movement can develop only under a regime which guarantees fundamental rights including the right of trade unionists to hold meetings in trade union premises, freedom of opinion expressed through speech and the press and the right of detained trade unionists to enjoy the guarantees of normal judicial procedure at the earliest possible moment.

...

77. Although the holder of trade union office does not, by virtue of his position, have the right to transgress legal provisions in force, these provisions should not infringe the basic guarantees of freedom of association, nor should they sanction activities which, in accordance with the principles of freedom of association, should be considered as legitimate trade union activities."

(Freedom of Association, supra, pages 19-20; emphasis added)

Under the title "2. Examples of trade union activity", the Committee found:

"B. Freedom of opinion and expression

General principles

172. The right to express opinions through the press or otherwise is an essential aspect of trade union rights.

...

174. While the Committee has been especially concerned with cases in which the freedom of the trade union press is involved, it has not suggested that the right of a union to express opinions through the independent press - if that press is prepared to print them - should be distinguished from the right to express opinions in purely trade union newspapers.

175. The full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end workers, employers and their organisations should enjoy freedom of opinion and expression at their meetings, in their publications, and in the course of other trade union activities.

...

Publications of a political character

183. When issuing their publications, trade union organisations should have regard, in the interests of the development of the trade union movement, to the principles enunciated by the International Labour Conference at its 35th Session (1952) for the protection of the freedom and independence of the trade union movement and the safeguarding of its fundamental task which is to ensure the social and economic well-being of all workers.

...

185. In one case where a trade union newspaper, in its allusions and accusations against the

government, seemed to have exceeded the admissible limits of controversy, the Committee pointed out that trade union publications should refrain from extravagances of language. The primary role of publications of this type should be to deal with matters essentially relating to the defence and furtherance of the interests of the unions' members in particular and with labour questions in general. The Committee, nevertheless, recognised that it is difficult to draw a clear distinction between what is political and what is strictly trade union in character. It pointed out that these two notions overlap, and it is inevitable and sometimes normal for trade union publications to take a stand on questions having political aspects as well as on strictly economic or social questions.

...

3. Right to organise administration and activities and to formulate programmes

General principle

319. Freedom of association implies the right of workers and employers to organise their administration and activities without any interference by the public authorities.

...

Activities and programmes

General principles

345. Freedom of association implies not only the right of workers and employers to form freely organisations of their own choosing but also the right, for the organisations themselves, to pursue lawful activities for the defence of their occupational interests.

...

Political activities

...

356. A general prohibition on trade unions from engaging in any political activities would not only be incompatible with the principles of freedom of association, but also unrealistic in practice. Trade union organisations may wish, for example, to express publicly their opinion regarding the government's economic and social policy."

(Freedom of Association, supra, pages 37-72; emphasis added)

When a union finds that a government economic policy such as free trade constitutes a threat or a benefit to its

membership, an article on that subject appearing in a union publication is indeed a lawful union activity under the Code.

For the majority, for a union of artists and performers who work in an often highly subsidized industry to take a position on a Free Trade Accord is as legitimate as it is for the Teamsters' Union to express their opinion on deregulation in the transportation industry.

Further, the fact that Mr. Goldhawk's role as spokesperson was determined by ACTRA in its by-laws is protected under the right of unions to adopt their own constitutions and rules protected by section 94(1)(a) of the Code and section 3 of Convention No. 87.

- b) Was the choice given to Mr. Goldhawk by CBC to choose between keeping his position as president of ACTRA or keeping his job as host of "Cross Country Checkup" tainted with anti-union animus?

For a complaint to be upheld under sections 94(3)(a)(i), 94(3)(e) and 96 of the Code, it is necessary to establish anti-union animus.

Anti-union animus is seldom established by direct evidence. It is more often deduced from a series of indicia rather than clearly demonstrated. Normally when assessing evidence in the context of allegations of anti-union animus, the Board will assume that the parties involved were fully aware of the potential consequences of their actions (Cadillac Fairview Corp. Ltd. v. R.W.D.S.U. (C.A.), supra). In this case, Mr. Goldhawk was plainly asked to choose between his

presidency at ACTRA and his job assignment at the CBC. Given the choice was quite clear, it follows that one could conclude on the basis of the usual rule summarized above, that CBC was actually intent on undermining the union. Yet, such is not our finding. Not without some hesitation we find, in view of all the circumstances of this case, that CBC's evidence established that the choice it gave Mr. Goldhawk on November 22 was not tainted with anti-union animus.

First, there is no indication on the record nor any allegation by ACTRA that the CBC's position was dictated by anything but what it considered to be the unavoidable consequences of its Journalistic Policy. That policy was neither aimed at ACTRA nor motivated by the fact that the CBC had contractual arrangements with ACTRA. CBC's motives were not to undermine ACTRA as a union organisation. We questioned whether there was a motive to "chill" ACTRA's membership by "penalizing" its top official. Given the evidence of past arbitration awards, even though they never involved outside activities where the Code was actually tested, we are satisfied that CBC's decision was not anti-union motivated. We add that the reason for our hesitation was the fact that CBC turned down the offer that Mr. Goldhawk keep his presidency while relinquishing all responsibilities as union spokesperson.

Given our finding that CBC's decision was not tainted with anti-union animus, the Board rejects ACTRA's allegations based on sections 94(3)(a)(i), 94(3)(e) and 96 of the Code.

- c) If not, with respect to section 94(1)(a), did CBC's Journalistic Policy constitute a valid justification, given the effect its decision had on the freedom of Mr. Goldhawk to be an officer of ACTRA and on ACTRA's right to organize itself and to represent its members without interference?

The finding by arbitration boards and by the CRTC that CBC's Journalistic Policy makes sense or is reasonable does not put an end to the Board's inquiry. ACTRA does not question the reasonableness of the policy itself but the legality of its application to Mr. Goldhawk and to ACTRA in the circumstances of this case.

In other words, what ACTRA argues is that the policy is reasonable so long as it does not interfere with statutory union rights. CBC argues that proper protection is found in the collective agreement.

Such protection was considered in section 76.1 of the collective agreement between CBC and NABET in 1970.

"the Corporation will not discriminate against any employee for anything said, written or done legally in furtherance of the policies and aims of the union'."

(Re Canadian Broadcasting Corp., supra, page 273)

In that instant case, the arbitration board chaired by O.B. Shime had to determine whether the CBC's policy directive was inconsistent with the terms of the collective agreement such as section 76.1:

"... Again, it is quite possible that the union in the exercise of its legitimate aims and purposes may involve itself in matters of 'current political controversy'. Thus, for example, the union may involve itself in supporting or attacking certain economic measures because of the impact of those measures on the wages of members

of the bargaining unit. Clearly, in that type of situation there may be a clash between the rule and the article. As matters now stand that potential clash is hypothetical, but if such a situation occurs art. 76.1 seems to provide ample protection for union employees who seek to further union policies and aims, by providing an appropriate defence to an employee who engaged in union activities thereby offending the policy statement. To that extent the express provision of the collective agreement may be ample shelter from the policy statement, but art. 76.1 by itself does not render the policy statement completely inoperative because there are areas beyond the union's policies and aims which the rule or directive may touch upon."

(Re Canadian Broadcasting Corp., supra, pages 273-274; emphasis added)

This award demonstrates that CBC's golden rule is not absolute but that it can indeed be subject to "contractual" exceptions (such as section 76.1 of the CBC Collective Agreement (1970)) or to "statutory" exceptions (such as section 94.1 of the Code).

According to the case law already reviewed, in order to determine whether or not a breach of section 94(1)(a) has actually been committed, the Board should further balance the legitimate reasons for CBC's conduct against the individual employee's and union's right to pursue their statutory freedom under the Code. This compromise approach might be questioned in this case in light of the International Labour Organization's guidelines but, given our ultimate finding, we need not enter into that here.

CBC certainly has a legitimate interest and right to protect its own integrity and impartiality through the implementation of a Journalistic Policy. However, CBC must show more than a broad legitimate concern for a strong journalistic policy. Yet, its particular application must be compatible with CBC's statutory obligations found in the Code.

Assuming, for the purpose of this discussion, that CBC could, albeit indirectly, regulate the content of a union newsletter, according to the Board's jurisprudence, CBC would still need to show compelling business reasons warranting such actions in order to escape section 94(1)(a). Further, the Board would need to be convinced that in the circumstances of this case, for Mr. Goldhawk to have remained in office in ACTRA after November 22nd while remaining an on-air journalist with CBC, would have had such a detrimental effect on CBC's image as the Public Broadcasting Agency and on its obligation to provide balanced information, that it warranted his removal from ACTRA. Finally, CBC would need to show that the facts surrounding CBC's decision to ask Mr. Goldhawk to step down as President of ACTRA genuinely warranted the effects of such a decision.

ACTRA, clearly has the right to freely designate who will act on its behalf. CBC's decision practically forced ACTRA to adjust its internal rules according to the Journalistic Policy and to reorganize its affairs. If the unit represented by ACTRA were only composed of on-air journalists, ACTRA would have simply been paralysed. In the instant case, even though ACTRA could operate otherwise, its very definite right to choose its leader was seriously curtailed by CBC's decision. Past experience within the CBC shows that other means, such as on-air disclosure, were used to ensure the public's right to impartiality. Further, we do not see how Mr. Goldhawk's forced resignation made him less identifiable with a controversial issue than before. In fact, it could be argued at least in the eyes of some, that he was sacrificed to free trade and in that sense that

he is still very much identified with the issue, regardless of his resigning his union office.

Finally, the Board must make sure that there is a close causal relationship between CBC's otherwise legitimate concerns and the scope of its action. As stated by the Board in Maritime Employer's Association, supra:

"... Anything less might in fact induce an employer to take advantage of a situation and act well beyond what is really called for and thus flout the rights of the union and the employees."

(pages 92; and 41)

In other words, the Board would need to try to accommodate CBC and ACTRA's rights "with as little destruction of one as is consistent with the maintenance of the other" (NLRB v. Babcock & Wilcox Co. (1956), 38 LRRM 2001, page 2004).

VII

CONCLUSION

The union activities performed by Goldhawk in a public capacity, as the spokesperson of ACTRA (public appearances, writing articles...) are but one minor aspect of his union duties as President of ACTRA. Although Mr. Goldhawk and ACTRA offered that he withdraw from his responsibilities as spokesperson, CBC still insisted that he relinquish all union functions on the grounds that free trade would remain a controversial issue.

Unions are expected by law to be autonomous and free from any domination or attempted domination by employers (see Canada Labour Code, Part I, section 25(1)). Parliament went further. Not only did it legislate that unions had to be

structurally independent from employers but it also legislated that employers could not even help them organize.

The legitimacy of Mr. Goldhawk's position in his union's newspaper was not really questioned by the CBC. CBC's concerns only appeared when Mr. Goldhawk's position was made public, i.e. known to the public at large.

CBC all but recognizes Mr. Goldhawk's right to take any position he wants within his union and in the union's newsletter. However, if that is made known to the public, albeit without the will of the union or its president, the CBC believes it is entitled under the Code to take the action it took here in order to safeguard its image of impartiality. Even though the Board may be sensitive to the CBC's concern, with respect, we cannot find as a matter of law that its position is well founded.

For the majority, Mr. Goldhawk's article was related to the interests of the collectivity of the union and was neither reckless nor maliciously untrue so as to lose the Code's protection. To use the words of the International Labour Organization, it did not, exceed "the admissible limits of controversy," which necessarily means that union publications can be controversial. This being said, we do not see on what statutory grounds CBC could rely to write off those rights guaranteed by the Code (Cadillac Fairview Corp. Ltd. v. R.W.D.S.U. (C.A.), supra).

CBC argued that Mr. Goldhawk could not, because he is the president of ACTRA, expect to be treated differently than the other journalists. With respect, we do not feel that this is the right way to put the question. The bottom line of the CBC's position is to say that ACTRA has the right to

question free trade, the right to publish a newspaper and to have its president sign an article in that newspaper and to have that newspaper circulated to its membership. However, if the author of that article happens to be work on a public affairs program on the CBC, such otherwise legitimate union action could be opposed by CBC and even lead to disciplinary action if the contents of such article were made public.

The examples drawn from arbitration awards of past experience, that were given by counsel for the CBC do not, in our view, carry the position of the Corporation all the way. These examples do serve to establish that the CBC's actions with respect to Mr. Goldhawk was consistent with past actions. For the most, they establish that the Goldhawk incident did not receive a particular treatment, and in that sense was not tainted with anti-union animus. Yet, none of these past incidents was examined in the light of the provisions of the Code prohibiting employer's interference in union activities.

The effect of CBC's decision with respect to Mr. Goldhawk is to prevent in fact a CBC journalist from chairing ACTRA, insofar as the chairmanship would comprise the duty to act as union spokesperson. That latter responsibility is by definition likely to expose whoever holds it to engage or to become involved in controversies of all sorts. If compliance with the Journalistic Policy means never being involved publicly in matters of controversy even in an official union capacity, then it becomes all but impossible, with such a far reaching application, to reconcile that policy with the basic freedom of unions to choose their officials and adopt their statutes and by-laws. With respect, this by itself constitutes a violation of the Code

(Maritime Employers' Association, supra). The statutory right of an employer to organize its business cannot be so broadly interpreted as to allow such a direct infringement on the statutory rights of employees to run their unions without interference.

As the Court of Appeal said in Cadillac Fairview Corp. Ltd. v. R.W.D.S.U. (C.A.), supra:

"The relationship between the conduct proscribed by s. 64 and the rights protected by s. 3 mandates that the Board, in the exercise of its jurisdiction, resolve conflicts between property rights and organizational rights. The resolution of the conflict will turn upon a balancing of those rights with a view to arriving at a fair accommodation between the interests sought to be vindicated by the assertion of the rights. The enforcement of s. 64 must contemplate incursions into the domain of private property rights and, as the complaint against Eaton's illustrates, into the domain of commercial and business rights as well. In my opinion, notions of absolutism have no place in the determination of issues arising under a statute designed to further harmonious labour relations and to foster the freedom of employees to join a trade union of their choice. In this area of the law, as in so many others, a balance must be struck between competing interests which endeavours to recognize the purposes underlying the interests and seeks to reconcile them in a manner consistent with the aims of the legislation."

(pages 219-220; emphasis added)

It would be somewhat surprising that Parliament would have wanted CBC employees, including its journalists, to be unionized like everyone else, and yet would not have wanted them to enjoy the same union rights similar employees have, including those in other broadcasting organizations in this country. Failing clear statutory provisions to the contrary, we find CBC employees and their unions have the same rights under the Code as those enjoyed by employees of the other employers governed by the Code.

All things being equal, when Canada Post complained in Canada Post Corporation (716), supra, that its employees' public declarations were disloyal and prejudicial to its image, that view was not fundamentally different from that taken by the CBC in this case. Canada Post wanted to be perceived as a dynamic and concerned organization, the same way the CBC needs to be perceived as an impartial broadcaster. Albeit for different reasons, both these employers were concerned with their image and both felt that their concern entitled them to prevent any negative public perception through the issuance and the application of internal codes of behaviour. As mentioned earlier, Canada Post took that decision of the Board to the Federal Court of Appeal and raised that kind of argument. Its application was dismissed from the bench. With respect, we find that such corporate codes of behaviour cannot amount to actually preventing a union from electing the officer of its choice or having that officer discharge the normal duties entrusted in him by the union's by-laws in the circumstances of this case. In that sense, the Code indeed gives union officers, in certain circumstances, a protection not given to their fellow colleagues who do not hold union office.

Finally, after having considered all the evidence, we do not find that CBC had compelling business reasons to ask Mr. Goldhawk to resign from ACTRA as a condition precedent to his continuing to host "Cross Country Checkup." As shown by its past practice, CBC never considered the statutory rights conferred by the Code. In requiring Mr. Goldhawk's resignation from ACTRA, CBC did not try to reconcile its own legitimate business concerns with its employees' own legitimate statutory union rights. Finally, CBC has failed to show any convincing causal relationship between Mr. Goldhawk's personally holding office in ACTRA after

November 22, 1988, and the CBC's image of impartiality, given that ACTRA has not changed its position on free trade and is still the bargaining agent of some of CBC's journalists, including Mr. Goldhawk.

Therefore, even when applying the balancing test set out in the jurisprudence, the majority finds a violation of section 94(1)(a) by CBC.

VIII

Remedial Order

ACTRA's complaint is granted in part under sections 97 and 94(1)(a) of the Code.

Section 99 determines the remedial authority of the Board when it finds a violation of section 94(1)(a).

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 94, [...] the Board may, by order, require the party to comply with or cease contravening that subsection or section and may...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

The conclusions sought by the applicant read as follows:

"32. ACTRA seeks the following remedies:

(a) A Declaration that the CBC and its named Officials have violated the Canada Labour Code, and in particular the above-referred to Sections;

(b) A Declaration that the CBC, and its Officers and Officials, including its above-named Officials, cease and desist from the violations aforesaid;

(c) A Direction that the CBC immediately, and insofar as it may be possible retroactively, rescind its Ultimatum to Goldhawk and acknowledge in writing to him, to ACTRA and, by notice in writing prominently posted in all CBC locations, to all employees of the CBC, that the CBC's Journalistic Policy does not prevent, nor is it intended to prevent, any employee from becoming, or continuing to be, an Officer or Member of ACTRA or any other Union, or participating in the lawful activities of ACTRA or any other Union while continuing to be employed in any capacity at the CBC;

(d) A Direction that the CBC publicly acknowledge that insofar as its Journalistic Policy may restrain, or seek to restrain, any Employee from holding Office, or speaking on behalf of the Union, its Membership, or otherwise speaking on any issue of significance to Union Members or Officers, such Journalistic Policy is of no force or effect and that it be amended so to reflect.

(e) An Award of Damages to the Union to compensate it for the loss to it of Goldhawk as President for the period from November 23, 1988, until the Decision of the Board.

(f) Such further and other relief as may be appropriate."

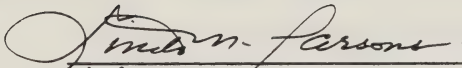
Mr. Goldhawk did not suffer any material loss in these incidents. In order to properly remedy CBC's unfair labour practice, we find it is sufficient to declare that when the CBC asked Mr. Goldhawk to resign his position as president of ACTRA in November of 1988 in the circumstances of this case, it violated section 94(1)(a) of the Code and that it shall refrain from so doing in the future.

The Board does not need to issue any specific remedy to allow Mr. Goldhawk to resume his position within the union. He can do so if he so chooses and CBC may not prevent him from doing so nor take any measure against him if he does, particularly not remove him from his show.

As mentioned earlier, it is not for us to determine whether the CBC's Journalistic Policy is legitimate nor well established. Let it suffice to say that even if the publication of Mr. Goldhawk's article in the union's newsletter had actually contravened the CBC's Journalistic Policy, the CBC could not, under the Code, take the action it took with respect to Mr. Goldhawk in the circumstances of this case.



Serge Brault
Vice-Chairman



Linda Parsons
Member of the Board

ISSUED at OTTAWA, this 20th day of December 1990.

Dissenting Opinion of Evelyn Bourassa, Member

I have now read the majority's reasons for decision. I agree for the most part with the facts as set out therein. I also agree with the majority's conclusion that the CBC had no anti-union animus when it presented Mr. Goldhawk with a choice of being either the on-air host of Cross Country Checkup or President, ACTRA, but not both. There was no evidence that could lead to an inference of anti-union animus.

My disagreement with the majority is with respect to their interpretation of the unfair practice provisions of the Code and the policy issues which arise as a result of the application of those provisions to the facts of this case. In particular I disagree with the majority on the question of what constitutes interference with the activities of a trade union. In this case no such interference occurred.

The protection afforded by the unfair practice provisions of the Code does not extend to all lawful activities of trade unions. The limits of the Board's jurisdiction in this area is reflected in the composition of the Board. Its members are appointed on the basis of their expertise in labour relations. That expertise does not entitle them nor does it render them competent to get involved in all matters that concern, no matter how indirectly, union issues. The Board's mandate is derived exclusively from the Code and is restricted to matters involving the Code's collective bargaining regime and the general relationship between a union, as exclusive bargaining agent for employees, and an employer. For matters that fall outside our authority over the collective bargaining relationship recourse must be had to other tribunals. Collective agreement violations and

infringements of fundamental civil rights are not matters for this Board to determine.

The activities for which the Union seeks the protection of the Code in this matter are purely political activities. The incident that triggered this dispute was the publication by the Union of its position on the free trade issue which was a central if not the dominant issue in the 1988 federal election. That position statement was endorsed by Mr. Goldhawk, the central figure in this case, in his capacity as ACTRA President, the complainant herein. The free trade issue concerned the government of Canada, the political parties who competed for the right to form the next government and the electorate and citizens of Canada. The free trade debate was not an issue between ACTRA and the CBC in the context of their collective bargaining relationship or their general labour relations. The activities of ACTRA or its officers with respect to this political issue do not enjoy the protection of the unfair practice provisions of the Code.

In order to determine the extent of the protection afforded by these provisions it is necessary to examine them in the context of the Code as a whole. The unfair practice provisions are sections 94, 95, and 96 of the Code. The Board is authorized by section 97 to determine complaints alleging unfair practices. The powers and duties of the Board in determining unfair practice complaints are set out in sections 98 and 99. These sections are all found in Part I of the Code.

The preamble to Part I of the Code illustrates Parliament's intent with respect to this tribunal and its jurisdiction:

"WHEREAS there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

AND WHEREAS Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

...

AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all; ..."

(emphasis added)

The Board has on prior occasions used the preamble to interpret sections of the Code where those sections were lacking in clarity. For example, the Board has given a broad interpretation of the definition of "employee" in section 3 in order to encourage access to collective bargaining. Traditional common law concepts defining an employee are not determinative when viewed in light of the preamble.

A similar situation arises with respect to certification. The encouragement of collective bargaining may force the Board to certify a small unit, one branch of a bank for example, because more stringent requirements would effectively deprive certain Canadian workers of their right to bargain collectively. Parliament's intent, as expressed in the preamble, can best be achieved in such cases by fashioning bargaining units that give employees a realistic possibility of exercising their rights under the Code. See Canadian Imperial Bank of Commerce (Victory Square Branch),

(1977), 20 di 319; [1977] 2 Can LRBR 99; and 77 CLLC 16,089 (CLRBR No. 90).

It should be clear from the preamble that not everything a union does, however legitimate, is protected under the Code. I use intentionally the term "protected" as opposed to "legitimate." The Board's role when dealing with unfair practice complaints is to protect activities related to collective bargaining. Collective bargaining obviously involves matters between the employer and its employees' representative, the trade union. Matters extraneous to this relationship do not receive the Code's protection. I have referred to the preamble in support of this position. This view is also supported by an examination of article 4 which is also found in Part I of the Code.

Article 4 sets out the application of Part I of the Code and provides as follows:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

(emphasis added)

Part I of the Code is limited in its application to the relationship between employers and employees. Union activities falling within this relationship receive the protection of the Code. Union activities that arise from their relationships with other parties such as employees of unions, the media, or the Canadian electorate are not protected.

This Board has previously looked at the extent of the protection afforded by the Code in the context of a complaint brought by employees of a trade union against the union on the basis that it, as their employer, had dismissed them in violation of the Code. As a condition of employment the complainants had also been members of the union and they also complained that the union had breached the Code by acting discriminatorily against them as members of the union. The Board in that case, Ed Finn et al., (1982), 47 di 49; [1982] 2 Can LRBR 399; and 82 CLLC 16,155 (CLRB No. 399), was headed by Vice-Chairman J.E. Dorsey, and delivered a unanimous decision in which it dismissed the complaints on the basis that the Board lacked jurisdiction to deal with them.

With respect to the first complaint, brought by the complainants in their capacity as employees of the trade union, the Board stated:

"On one occasion this Board has assumed jurisdiction over a union as employer. On another it has held it was without jurisdiction. Conversely provincial boards have repeatedly asserted jurisdiction over unions as employers including those that act regularly or exclusively as bargaining agent of employees in the federal jurisdiction..."

(pages 63; 409)

This situation was explained by the Board:

"A commonly held view that trade unions as employers are local works and undertakings is reflected in the assumption and absence of objection to the provincial boards' jurisdiction in the cases cited. This view was reflected by this Board in a recent decision."

(pages 64; 410)

The Board then reviewed its decision in Keith Sheedy (1980), 39 di 36; [1980] 1 Can LRBR 391; and 80 CLLC 16,029

(CLRB no. 230), where it reviewed section 108 (now section 4) and stated:

"Section 108 also expresses application of Part V to 'trade unions ... composed of such employees' ... 'who are employed upon or in connection with the operation of any federal work, undertaking or business'. Trade unions as such are not federal works, undertakings or businesses. As employers they may come under Part V if they employ in the Territories or carry on any activity upon or in connection with the operation of any federal work, undertaking or business. As a bargaining agent they are affected by and acquire rights under the Code."

(pages 50-51; 402; and 14,285; emphasis added)

Based on these statements, it is clear that Parliament, and hence this Board, has jurisdiction over the activities of trade unions composed of employees employed upon or in connection with federal works, undertakings or businesses in so far as they concern the union's role as bargaining agent for those employees. This jurisdiction over the collective bargaining activities of these unions does not endow the Board with jurisdiction over all their activities. As the Board stated in dismissing the first complaint in Finn et al., supra:

"Section 108 of the Code says Part V of the Code applies ... in respect of trade unions ... composed of such employees ..., namely, ... who are employed upon or in connection with the operation of a federal work, undertaking or business ... That language was not intended to make the Code apply where it could not otherwise constitutionally apply. It was not intended to extend the application of the Code to a trade union as employer because of the work of its members..."

(pages 65; 411)

The Board in Finn et al. also dismissed the second complaint in which the complainants had alleged that as members the union had acted in a discriminatory manner in dismissing them. The Board again reviewed the jurisprudence concerning Parliament's jurisdiction over trade unions. The Board again

referred to it's previous decision in Keith Sheedy, supra, where it stated:

"In each instance of regulation of the affairs of trade unions Parliament encounters legal friction between its right to regulate labour relations, extended from the traditional world of relations between employers and employees represented by trade unions to the relations between the trade unions and those they represent, and the right of the provinces to regulate unions as a matter of property and civil rights. Because unions have no constitutional character and operate in both provincial and federal arenas and have members employed in both, who may frequently transfer between each, the location of legislative authority has never been clear."

(pages 51; 402; and 14,285)

This uncertainty with respect to constitutional jurisdiction over the affairs of trade unions per se should not be ignored by this Board in determining which union activities receive protection under the Code and which do not. As Dorsey stated in Canada Labour Relations Board, Federal Law and Practice:

"What can it (the federal government) regulate under its umbrella of labour relations authority? Can it legislate picketing laws, union trusteeship supervision, union election rules? What are the boundaries between federal authority over labour relations and provincial authority over property and civil rights? Definite answers will not be found here or elsewhere. It is only possible to provide some of the compass points for finding the limits. Although the Board is not given the task of answering these questions, it must appreciate the problems if it is to explain some of the provisions of the Code and their limitations."

(page 82)

Parliament has not expressly stated that purely political activities of trade unions would receive protection under the Code. The Code itself deals primarily with the collective bargaining and labour relations regime governing federal employers, their employees and the trade unions representing them. An interpretation of the Code that would extend its application to activities outside of the

collective bargaining relationship seems unwarranted in light of the constitutional uncertainty surrounding Parliament's and this Board's authority over trade unions per se.

It is easy to look at the facts in this case, determine that the ACTRA President was involved, then label his actions "protected union activity." The majority would not allow the CBC to take any action unless it were shown that the President's were "reckless or maliciously untrue" or the conflict of interest guidelines constituted a compelling necessity for interfering with the President's actions.

This position ignores the reality of today's unions. Unions involve themselves in many situations that do not relate to collective bargaining. Such activities are legitimate, in the sense that they are not illegal, but they are not protected by our Code.

Let us take an example that is somewhat similar to the episode before us. During elections both unions and employers may publically support certain political parties. There is nothing illegitimate in that. It is a fundamental democratic freedom. But do such actions relate to collective bargaining? Can the union and the employer negotiate who will win the election?

This Board has never previously dealt with the question of whether the activities of a union or its officers in taking a public position on political issues constitutes protected activities under the Code. The Ontario Labour Relations Board has developed some principles pursuant to its governing legislation which are of some assistance in this case.

In The St. Catharines General Hospital, [1982] OLRB Rep. March 441, the Ontario Board dismissed a complaint brought by the Ontario Nurses' Association in which it alleged that the respondent hospital had violated sections 64, 66, and 70 of the Ontario Labour Relations Act. In that case the President of the complainant union had spoken with the press and publicly criticized the hospital's staffing arrangements. At the same time she incorrectly linked the death of a patient to the inadequacy of staff at the hospital. The respondent reported the actions of the Union President to the College of Nurses of Ontario. The issues were set out by the Board as follows:

"The issues before this Board are whether the grievor is entitled to the protection of the Labour Relations Act in having acted as she did and, if so, whether the respondent improperly attempted to interfere with the exercise of her freedom under the statute by filing the complaint with the College of Nurses."

(page 475)

The Board also stated:

"In considering whether the grievor's actions are protected by the Labour Relations Act regard must be had to sections 3 and 64. They provide:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employer's organization and no person acting on behalf of an employer or employer's organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."

(page 475)

Section 3 of the Act is almost identical in wording to section 8(1) of the Canada Labour Code which states:

"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities."

And section 64 is similar in terms to sections 94(1)(a) and (b) of the Code which state that:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

(b) contribute financial or other support to a trade union."

The Ontario Board reviewed the American authorities and set out the following principles derived from those authorities:

"If a trade union official publicly attacks an employer on non-labour relations issues, he breaches the duty of good faith and fidelity and the Jefferson Standard case supports the imposition of discipline or discharge. This is so even when the attack is to achieve a collective bargaining goal ... But if the statements relate to collective bargaining matters and are made without malice, the activity is protected under the National Labor Relations Act."

(page 487)

These principles are derived from cases involving public attacks on an employer by trade union official. For this reason the Board noted that the malice requirement was based on a concern for the delicate nature of public comment. The case before us does not involve an attack on an employer nor does it raise in any other way the question of malice. What is relevant to this case in the principles referred to above is the requirement that the statements relate to collective

bargaining matters in order to receive the status of protected activities under the National Labor Relations Act.

The Ontario Board also reviewed existing Canadian authorities and noted:

"Labour Boards have been reluctant to involve themselves as the censor of public statements made in the context of collective bargaining negotiations on the understanding that such tactics have come to be part and parcel of that process ... Against this background, it would be naive and unduly restrictive not to acknowledge the legitimate role of public comment and media interest in the collective bargaining process, although we sense that public posturing is not always a constructive force in labour and management disputes."

(page 487)

The Board in The St. Catharines Hospital, *supra*, ruled that the grievor's statement constituted proper trade union activity protected by the statute. It expressly declined to make a broad statement of principle at that time. It had noted that the subject matter of the statements was an issue of concern to the nursing profession and had arisen as an issue under the parties' collective agreement:

"We are confronted with a public sector collective bargaining relationship and an issue of vital importance to nursing professionals, the community, and hospitals. The conference was preceded by a complaint under a collective agreement culminating in the Assessment Committee's report and the parties were at an impasse over the implementation of that report. Thus, the more particular issue is whether the grievor's public statement constituted proper trade union activity protected by the statute."

Again, on the particular facts before us, we have come to the conclusion that she is entitled to seek the protection of the Act."

(page 488)

As stated the Board expressly restricted its decision to the particular facts of that case. The fact that is of significance for this case is that the issue on which the

grievor had spoken publicly was an issue that had arisen in the collective bargaining relationship between the complainant and the respondent. The Board had noted in its review of American cases that statements must relate to collective bargaining issues in order to receive protection under that country's National Labor Relations Act.

The question of the extent to which the political activities of unions would constitute protected activities under the Ontario Labour Relations Act was before the Board of that province in The Adams Mine, Cliffs of Canada Ltd., Manager [1982] OLRB Rep. Dec. 1767. In that case union officers had posted union notices on union bulletin boards located on the employer's premises. The notices supported the New Democratic Party of Canada, a registered federal political party, in an impending by-election in the federal district of Timiskaming. The notices also included statements about such issues as fuel costs, interest rates and their effect on employment, and whether or not job creation should be the top priority of the federal government. Canvassing of employees also took place on the employer's premises although the Board held that it was not necessary in the circumstances to determine whether such canvassing took place on company time or whether it disrupted operations.

The employer posted a notice in which it informed the employees that political campaigning and posting of political notices on company property was prohibited. The union brought a complaint before the Board alleging that the employer's response constituted interference with the union's lawful activities, namely, participation by the union and its members in its campaign in support of the Canadian Labour Congress and its political affiliate, the New Democratic Party of Canada. It argued that the on-the-

job canvass was a lawful trade union activity within the meaning of section 3 of the Labour Relations Act and for that reason persons participating in such activity were protected by sections 64, 66, and 70 of that Act. The employer argued that while the activity of the union may be lawful activity it was not protected under the Act. The Act, a collective bargaining statute, protected union activities pertaining to the collective bargaining process and to employees as employees.

The Ontario Board ruled that the union activities in question did not constitute protected activities within the context of the Ontario Labour Relations Act:

"On considering the material as a whole, we have come to the conclusion that in the circumstances of this case the activity is too remotely connected to the dominant purpose of the Labour Relations Act to attract the right asserted by the complainant. In our view, the communications in issue before us are not as connected to concerns of the bargaining unit employees as employees as they are to their concerns as voters. The complainant is therefore not communicating to bargaining unit employees primarily because of its status as their exclusive bargaining representative but rather as an affiliate or supporter of a political party seeking the electoral support of certain employees."

(page 1787)

The Board in reaching this conclusion made a number of comments that are pertinent to this case and which distinguish between the role of the trade union as a collective bargaining agent and other roles it might fulfill such as political activists or lobbyists. The Board stated:

"As the complainants' objectives reveal, it is committed to activities, including collective bargaining, aimed at improving the general welfare of employees and securing an atmosphere more favourable to the activities of unions generally. Realistically, certain trade union objectives cannot be achieved through negotiations such as public education, social insurance of various kinds, adequate housing and effective economic management of the economy. Other objectives can be achieved much faster through legislation such

as minimum wages, maximum hours, health and safety standards, minimum union security provisions, and labour law reform generally. Indeed the passage of the Labour Relations Act itself is, in part, a product of broader trade union activity. The Canadian Labour Congress to which many of Canada's trade unions are affiliated, has always had as one of its purposes, the focusing of organized labour's broader objectives. It is therefore clear that trade union activity involves more than face to face collective bargaining negotiations in the pursuit of employee interests. The formal certification of a trade union does not change this organic nature of a trade union organization or its relationship to its members.

On the other hand, the dominant purpose of the Labour Relations Act, as discerned from its provisions is much more narrow and as stated in the preamble, centers on the 'furtherance of 'harmonious relations between employers and employees by encouraging the practices and procedures of collective bargaining between employers and trade unions as the freely designated representatives of employees'.

To this end the statute creates an elaborate framework to allow employees to freely designate trade unions as their exclusive bargaining representatives in their relationships with their employers. Once certified, a trade union legally speaks for bargaining unit employees with respect to 'terms or conditions of employment or the rights, privileges or duties of employers' ... The Act deals with a restricted but vital area of trade union interests - the collective bargaining process. It is this dominant purpose of the statute and all related activity necessarily incidental to this purpose which demarcate the Board's jurisdiction."

(page 1780)

The Canada Labour Code also has as its dominant purpose the encouragement of collective bargaining between employers and trade unions freely chosen to represent the employees of those employers. The principles expressed by the Ontario Board in The St. Catharines Hospital, supra, and in The Adams Mine, Cliffs of Canada Ltd., Manager, supra, are applicable to the interpretation of the unfair practice provisions of the Code and to a demarcation of this Board's jurisdiction with respect to the regulation or protection of trade union activities.

Indeed the restricted constitutional jurisdiction of Parliament over the regulation of trade unions would seem to call for an even more cautious approach in determining what constitutes protected activities under the Code. It is only those members of trade unions who are engaged as employees of or on federal works or undertakings who fall within Parliament's jurisdiction. This implies, as this Board found in Ed Finn et al., *supra*, that some union activities falling outside the collective bargaining relationship are not within Parliament's jurisdiction over labour relations.

It is possible that some of those activities would fall within federal jurisdiction on some other basis. The Code, however, is supported by Parliament's jurisdiction over the labour relations of employers and employees engaged on or upon federal works and undertakings. The language of the Code restricts itself to addressing the necessary elements of a collective bargaining regime to govern those labour relations. The language of the Code does not indicate Parliament's intention to legislate in respect of union activities falling outside the collective bargaining relationship based on some other aspect of federal legislative authority.

II

The decision of the majority in this case refers to the preamble and the adoption of ILO Convention No. 87 in support of its conclusion that Parliament intended to protect, under the provisions of the Code, the freedom of expression of union officers, even where the matters being expressed do not relate to issues arising out of a collective bargaining relationship. I am mindful of the

significance of Canada's endorsement of this and other international labour conventions. It is still necessary, however, to determine the extent to which Parliament has actually implemented the convention by examining the language of the Code itself. It is also necessary to keep in mind the uncertainty that exists with respect to Parliament's constitutional jurisdiction over trade unions. In light of what I have previously stated on these points I am not of the opinion that the reference in the preamble to Convention No. 87 indicates Parliament's intention to extend the protection of the Code to expressions of union officers concerning non collective bargaining relationship issues.

For that matter it is not entirely clear to me that Convention No. 87 deals with the prevention of employer interference in lawful union activities. Convention No. 87 deals primarily with the relationships between governments and trade unions. It addresses the problems of state interference in trade union activities not employer interference. It could be argued that the protection of union activities from employer interference requires state action in the form of legislation which a state would be required to enact as a result of the obligations assumed by signing Convention No. 87. Such an argument ignores the fact that a subsequent ILO Convention was passed to address the relations between employers and workers. These conventions are described in Freedom of Association, A Workers' Educational Manual, (Geneva: International Labour Office, 1987):

"Briefly, Convention No. 87 guarantees to all workers and employers, without distinction whatsoever and without previous authorization, the right to establish and join organizations of their own choosing ... It will thus be seen that Convention No. 87 is addressed on the whole to the protection of freedom of association against possible incursion by the State.

Convention No. 98, which supplements Convention No. 87, is oriented more to questions concerning relations between employers and workers. It protects workers against acts of anti-union discrimination in respect of employment and stipulates, in particular, that workers' organizations shall enjoy adequate protection against interference by employers."

(page 4)

Parliament has referred to Convention No. 87 in the preamble to the Code, and not Convention No. 98. Since Convention No. 98 deals with the prevention of employer interference in union affairs I do not see how the reference to Convention No. 87 in the preamble can support the position that Parliament intended to protect all statements made by union officers from interference by employers.

Even in the context of Convention No. 87 the Committee on Freedom of Association has recognized that a distinction must be made between expressions of trade union officers in relation to occupational matters and those which are political in character. In its 14th report, case # 101 the Committee stated:

"In the present case the complainant has not, as it did in the Madagascar case, communicated to the Committee publications which it states were purely occupational in character. The Committee, while recognizing that there may be cases in which it is impossible or administratively impracticable to distinguish between the publications of a particular organization which are of an occupational character and those which are political in character, emphasizes the importance which it attaches to such a distinction being drawn wherever feasible, but considers that on the facts of the present case no evidence has been produced to show that the circulation of purely occupational publications has been restricted."

Subsequent decisions of the Committee have reiterated the distinction between publications of an occupational character which draw the protection of the Convention and those of a political character which are not afforded that

protection. See the 141st report, case # 729, and the 147th report, cases 698 and 749.

For all these reasons I must conclude that the reference in the preamble of the Code to ILO Convention No. 87 does not support an interpretation of the Code that extends the Code's protection against employer interference to public statements made by union officers which do not relate to issues arising out of a collective bargaining relationship.

III

In concluding that public statements made by union officers which do not address collective bargaining issues are not protected under the Code I have not ignored the cases cited by the majority in support of their decision. Not one of these cases deals with a non collective bargaining situation. The absence of any cases of this type may well be attributable to the fact that all labour codes deal with and are limited to their particular collective bargaining regimes. Claims of interference unrelated to their regime simply do not come before labour boards. I will set out some of the majority's cases with a brief description of the issue involved.

1. Ottawa - Carleton Regional Transit Commission (1984), 56 di 203; and 7 CLRBR (NS) 137 (CLRB no. 475)

This case dealt with the solicitation of union membership on employer premises. The Board found that only compelling and justifiable business reasons could support an employer's attempt to limit solicitations.

2. Maritime Employers' Association (1985), 63 di 69; and
12 CLRBR (NS) 18 (CLRBR no. 540)

The employer in this case refused to meet with a union representative who had physically attacked certain members of management during a meeting.

These initial cases deal with interference in situations not involving public comments or positions by union officials. Neither is particularly relevant to the instant case. Other cases cited by the majority involve public comments by union officials and consequent employer discipline. In these cases the employer or the employer's policy is criticized, directly or indirectly, with respect to bargaining unit issues.

3. Canada Post Corporation (1987), 71 di 215; and 87 CLLC
16,060 (CLRBR no. 654)

In this case, one Mrs. Samson, the Vice-President of the Maritime Branch of the Canadian Postmasters and Assistants Association, spoke publicly and critically about a government policy that authorized Canada Post to reduce rural services by closing certain post offices and selling or franchising others to the private sector. Canada Post disciplined Mrs. Samson for the public criticisms.

The Board in that case noted that the complainant spoke out publicly in order to protect the jobs of her members. Indeed, the major issue at the on going collective bargaining sessions concerned jobs and the effect the plan would have on them. The Board noted that a union official could speak out publicly on such issues and that such comments were not limited to periods of active negotiation.

4. Québecair/Air Québec (1987), 72 di 44; and 88 CLLC 16,035 (CLRB no. 659)

During a lawful strike, a union official made certain comments to the media about the safety of Québecair aircrafts. The employer disciplined the official based upon its policy prohibiting public criticism of the employer. The Board noted that during times of economic warfare between the union and the employer such recourse to the media was to be expected. In such a context, only criminal or unlawful acts would merit discipline.

5. Canada Post Corporation, (1988) 88 CLLC 16,064 (CLRB no. 716)

Ron Kucey, a union official for the Letter Carriers' Union, publicly criticized Canada Post's plans to limit door-to-door delivery and replace it with "super mailboxes." Mr. Kucey made the comments during a meeting before a local corporation. Canada Post imposed a five-day suspension for the comments.

The Board noted its agreement with the earlier Canada Post decision, supra, (the Samson case). The panel summarized the Samson decision as follows (page 14 of the Board's looseleaf decision):

"The Board concluded among other things in that case, that a union official, acting on behalf of the union, even if he or she were also a full-time employee of the employer, could publicly criticize the employer and seek to enlist public support for a campaign to bring about changes in the employer's policies and/or practices, not solely during a time of collective bargaining but at any time, without risking discipline by the employer. Or to put it another way, that an employer would be interfering with the 'representation of employees by a trade union' and breaching other aspects of section 184 of the Code, if in such circumstances, it imposed discipline."

(emphasis added)

The Board went on, however, to note that the policy had certain qualifying factors or limitations (page 14 of the looseleaf decision):

"Obviously a union officer would not be protected by the Code in respect of everything he or she might say publicly. It would have to be relevant to the policies, interests and concerns of the union as such, although it would not have to be something virtually scripted by the union and followed slavishly by the officer. The protection of the Code would not extend to a union officer who used his position to make public comments concerning an employer in furtherance of a personal or other objective which could not be linked to the interests of the collectivity."

(emphasis added)

The Board ultimately found that Mr. Kucey's statements, while perhaps containing some modest rhetorical exaggerations and half-truths, still did not go far enough to deprive him of the Code's protection. Statements that crossed the protected activity line would have to be "extreme," "false and very unfair," "in reckless disregard for the truth," or "blatantly false."

6. Wardair Canada Inc. (1988), 89 CLLC 16,009 (CLRB No. 722)

This case involved public comments made by a union official criticizing Wardair for its treatment of women. The official's conduct, however, was isolated from collective bargaining and did not relate to any strike. She was not a member of the bargaining committee. The union had already decided that the discrimination issue would not become a strike issue. The Board concluded that the complainant's public comments about the employer were either misleading or partially untrue and therefore she had crossed the line of protection offered by the Code. The Board realized, at least implicitly, that the more tenuous the link between the

actions and collective bargaining, the lower the protection offered by the Code.

7. Cincinnati Suburban Press (1988), 289 NLRB 127, page 30,906; and 1129 LRRM 1033, page 1035

This American case involved the suspension and discharge of a newspaper reporter who had published an article in another magazine about a union's unsuccessful campaign to organize editorial employees of his newspaper. His employer's imposition of discipline was overturned.

The other cases cited by the majority also have one thing in common with the cases cited above. They all involve directly some element of the Code's collective bargaining regime. The majority acknowledges that their cases deal with "public statements made directly against the employer." The obvious point of difference in this case is that the statement issued by the complainant's president was not an attack on the employer. Nor did it refer to a matter that was in issue between the complainant union and the respondent employer in their collective bargaining relationship. Unfortunately, however, the majority still applies the tests and principles formulated in those cases without regard for that distinction.

Obviously the free trade agreement itself could not be a negotiable item between the CBC and ACTRA. The CBC does not govern the country and cannot affect what the government does in its economic affairs. It is preposterous to think that ACTRA would go on strike unless the CBC agreed to do something about the free trade deal. Obviously then the free trade agreement cannot be a bargaining unit issue

arising from the collective bargaining relationship between the CBC and ACTRA.

The majority, however, argues that it was possible for the effects of the free trade pact to have an impact on the complainant's membership including a possible loss of jobs. Thus, for the majority, the union president's public statement constituted lawful union activity under the Code. I do not dispute that his statement was lawful union activity. I do disagree that it constituted protected activity under the Code. It was not an issue between the CBC and ACTRA in their relationship as federal employer and bargaining agent on behalf of the employees of that federal employer. That is the relationship governed by the Code. It is only activities arising in the context of that relationship that receive the protection of the Code.

Some may argue that my interpretation is too restrictive and will result in employer discipline in areas I have defined as falling outside the parameters of the Code. My response is simple. Nothing I have said will allow an employer to avoid the unfair labour practice provisions of the Code if he acts for anti-union reasons. This Board has said many times that the slightest indicia of anti-union animus will taint an action that would otherwise be perfectly acceptable. My position does not change this practice one iota.

Another point that might be raised and one that appears in the majority decision is that certain union positions, even if not directly related to the collective relationship between the employer and the union, nonetheless protect the job security of union members. This argument provides in effect that anything said or done by a union official, no

matter how tenuous the link to collective bargaining may be, validly represents the interests of a particular bargaining unit. With respect, that misses the point that the substance of the activity must be considered and must be an element of the collective bargaining relationship between the union and the employer who is alleged to have committed the unfair practice. The panel in Wardair implicitly noted this point.

Any position put forth by a union can be said to relate to the overall benefit of union members. However, I think a board with our specific mandate has to be realistic about the link between true bargaining unit issues and a union's overall activities. Apart from the jurisdictional restrictions that I have already touched on, there are some very practical limitations to keep in mind. For example, what if ACTRA decided through its President to take position against the government's recent decision to send ships to the Persian Gulf? Certainly for journalists, who might be expected to cover the events, if not for all of us, war is not a pleasant prospect. But is the government's decision to get involved a collective bargaining matter? Is it a matter that falls within the labour relations expertise of the members of this Board? Will the union go on strike if the CBC does not take action to have our troops pulled out of the Persian Gulf.

IV

I have attempted to set out what I see to be the limits of this Board's jurisdiction with respect to complaints alleging employer interference with union activities. In doing so I do not suggest that this Board should have

deferred to arbitration in this case as it could have pursuant to section 98(3) of the Code. That section states:

"98.(3). The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred to arbitration pursuant to a collective agreement to an arbitrator or arbitration Board."

When a matter of Code policy and interpretation is controversial, as this one has turned out to be, it is in the interests of the parties that the Board come to a decision. It may take time to get a definitive answer to the question by all members of the Board but it is a question that must be faced rather than referred to arbitration. Once definitively decided, the parties will then have a better understanding of their rights and obligations under Part I. For this reason, on the specific facts of this case, deferral was not warranted.

V

Given my view of this Board's lack of jurisdiction in this matter I will make only a few comments about some of the points made by the majority in that part of its decision where it deals with the merits of the allegation. Generally, this case is not about the CBC refusing to have its on-air journalists sit on the ACTRA executive. Indeed, one witness, Ann Medina, an on-air host on occasion, sits on the ACTRA executive (or did at the time of the hearing). It was only when Mr. Goldhawk made a public statement on a very controversial issue, one that became even more important because of the ensuing federal election, that the CBC applied its conflict of interest policy. I assume it would do the same thing if other well-known hosts such as Barbara Frum or Peter Mansbridge became ACTRA'S

president/spokesperson and then took a public position on a very controversial issue, one that had nothing to do with the collective bargaining relationship between the parties. The situation might be different had Mr. Goldhawk made public comments critical only of the CBC's conflict of interest policy. In that case, the public comments would be more closely aligned with collective bargaining issues over which the CBC has some control. Such is simply not the case before us.

I cannot agree with the majority when it finds the situation of the CBC to be directly comparable to that of Canada Post on the basis that they are both federal Crown corporations and should thus be considered under those principles that govern private entities under the Code. First of all, Canada Post, unlike the CBC is not involved in the very sensitive areas of communications and broadcast journalism. As a significant member of the broadcast media in this country, the CBC has concerns and duties which are totally different from those with which Canada Post must concern itself. One of those concerns is the requirement of impartiality on the part of its on-air personnel.

This Board was presented with a number of arbitration awards involving media in which conflict of interest policies like those of the CBC were upheld on the basis that they were justified by the requirement of impartiality. Some of those awards involved the CBC and its policies. While some of the concerns of arbitration are different from those before this Board, the value of the findings of those awards is not necessarily diminished. This is particularly so when such experienced and distinguished labour arbitrators as Owen Shime and the late Bora Laskin are the arbitrators as in several of the cases presented to this

Board. I would also note that the Ontario Labour Relations Board in The St. Catharines Hospital, supra, one of the decisions relied on by the majority, took particular interest in the award of arbitrator Shime in CBC and NABET (1974), 4 L.A.C. (2d) 263, and quoted from that decision:

"In the instant case we are concerned with an employer involved in an enterprise which differs considerably from the normal manufacturing plant. It is involved in communications which is a sensitive area. For example in presenting a news broadcast whether by radio or television, the CBC must be conscious of its impartiality, and it is therefore of legitimate concern that the person communicating the news maintain an integrity that neither impairs the CBC's attempts at impartiality, nor its image of impartiality."

(page 482; emphasis added)

While I do not wish to engage in an exploration of this complaint on the merits, because of my views on this Board's jurisdiction, I have emphasized the above portion of the quote to point out that CBC's concern with impartiality is not just a legitimate concern, it is a matter with which it must be concerned. It is indeed a compelling concern. There was much evidence and argument presented to this Board as to why it is such a compelling concern. Its unique role as a broadcaster mandated to promote national unity and its role as a public broadcaster deriving a significant portion of its funding from public funds demand that the CBC maintain the highest standards of impartiality.

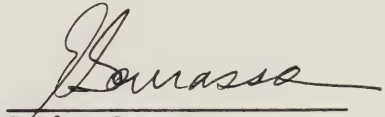
VI

SUMMARY

In summary, protected union activities under the Code do not extend to all activities carried out by a union. Common sense dictates that we distinguish between issues that concern an employer and the union representing its employees

and general social or political issues. When these latter non-protected activities are in issue, as in this case, the tests developed for protected activities simply have no application.

It is rather easy to note that Mr. Goldhawk published his article in the ACTRA newsletter and conclude that therefore that act constituted a protected activity under the Code. As I have noted above, the Code has limits. It is not a general regime allowing us to intrude in any situation involving a union. The Code's regime encourages us to promote and protect collective bargaining. When issues go beyond this mandate we must recognize the limits of our expertise and defer to other, more appropriate forums. This is not refusing to exercise our jurisdiction; instead it is respecting the mandate entrusted to us by Parliament.



Evelyn Bourassa
Member of the Board

information

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SUMMARY

**MARCEL LAFRANCE, COMPLAINT,
AND LAROSE-PAQUETTE AUTOBUS
INC., RESPONDENT EMPLOYER.**

Board File: 745-3580

Decision No.: 840

RÉSUMÉ

**MARCEL LAFRANCE, PLAIGNANT, ET
LAROSE-PAQUETTE AUTOBUS INC.,
EMPLOYEUR INTIMÉ.**

Dossier du Conseil : 745-3580

Décision n° : 840

Unfair labour practice complaint. Canada Labour Code (Part I - Industrial Relations), section 94(3)(a)(i). Allowed. Dismissal rescinded.

After reviewing the rules governing the onus of proof under section 98(4) of the Code, the Board allowed the complaint.

Reinstatement and compensation ordered pursuant to section 99 of the Code.

Plainte de pratique déloyale du travail. Code canadien du travail (Partie I - Relations du travail) sous-alinéa 94(3)a)(i). Accueillie. Congédiement annulé.

Après un rappel des règles régissant le fardeau de la preuve selon le paragraphe 98(4) du Code, le Conseil a accueilli la plainte.

Réintégration et dédommagement ordonnés en vertu de l'article 99 du Code.



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Reasons for decision

Marcel Lafrance,
complainant,
and
Larose-Paquette Autobus Inc.,
respondent employer.
Board File: 745-3580

The Board was composed of Mr. Serge Brault, Vice-Chairman, as well as Messrs. Robert Cadieux and François Bastien, Members.

Appearances:

Mr. Maurice Laplante, assisted by Mr. Gilles Girard, for the complainant; and

Ms. Danielle Girard and Messrs. André Gagnon and Robert Fauteux, assisted by Ms. Claire Duthé, for the employer.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

The proceedings

The present decision was rendered orally on December 5 in Montréal at the conclusion of a hearing that began the previous day. An interim decision dismissing a preliminary objection based on the Canadian Charter of Rights and Freedoms was also rendered in the instant case on July 30, 1990 in Larose-Paquette Autobus Inc. (1990), as yet unreported CLRB decision no. 815. The present reasons deal with the merits of the case.

The Board has before it a complaint alleging that Larose-Paquette Autobus Inc. (the employer or Larose-Paquette) dismissed Marcel Lafrance (the complainant) for his union activities, contrary to section 94(3)(a)(i) of the Canada Labour Code (Part I - Industrial Relations). On the date of his dismissal, Mr. Lafrance, a bus driver, was president of the Syndicat des travailleurs(euses) de Larose-Paquette (CNTU).

II

The law

Section 98(4) of the Code stipulates the following:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

Thus, in order to discharge this burden, the employer must prove, not that there was just and sufficient cause to dismiss, but that the dismissal was unrelated to the dismissed employee's union activities. It has been consistently held that the employer must prove that its decision concerning the employee was devoid of any anti-union animus (Inuvik Housing Authority et al. (1987), 69 di 212 (CLRB no. 627)). It has also been held that at the least sign that an otherwise warranted decision was also tainted by anti-union animus, no matter how warranted this decision may otherwise have been, it will be rescinded (Oshawa Flying

Club (1981), 42 di 306; and [1981] 2 Can LRBR 95 (CLRB no. 293); and Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97)).

Anti-union animus manifests itself in various ways. Rarely does it take the form of an admission. Proof of the existence of anti-union animus is often established through clues and circumstantial evidence:

"... In other words, motive need not be established always by direct evidence. As the United States Supreme Court explained in Radio Officers' Union v. N.L.R.B.:

'... This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the commonlaw rule that a man is held to intend the foreseeable consequences of his conduct.'"

(George Adams, Canadian Labour Law (Aurora: Canada Law Book Inc., 1985), page 495)

In the instant case, Larose-Paquette denied any connection between Mr. Lafrance's union activities and the discipline imposed on him. The sole reason for his dismissal, it argues, is a series of job-related offences that need not be listed here.

III

Analysis of the evidence

This warrants that the Board carefully examine all the evidence to determine whether in fact anti-union animus was present. In order to prove that its action was devoid of anti-union animus, the employer can argue that the penalty imposed on the employee was rational and warranted strictly from the standpoint of sound management.

In the instant case, the Board notes that the evidence reveals that Larose-Paquette's actions were far from rational. Although the Board does not believe that Mr. Lafrance's conduct in this matter is above reproach, nor accept all the explanations he gave us, the fact remains that Larose-Paquette offers no plausible explanation for certain specific disciplinary measures taken against Mr. Lafrance. The employer specifically alleged that its decision was motivated by the seriousness of certain incidents that were established, its representative claimed, after a thorough investigation. This is not the case. Even a brief investigation would have revealed that, at least, one of the alleged grounds of dismissal was totally unfounded. This is reason enough for us to question all the employer's evidence, bearing in mind that Mr. Lafrance had just been re-elected president of the union barely two weeks before his dismissal.

Given the weight of the presumption established in section 98(4) and our sense of the evidence as a whole, we are forced to conclude that Larose-Paquette's conduct was tainted by anti-union animus. Consequently, Larose-Paquette did not discharge the burden of proof imposed on it by section 98(4) and the complaint must be upheld.

IV

The remedy

Section 99 of the Code stipulates the following:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with ... sections ... 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that ... section and may

...

(c) in respect of a failure to comply with paragraph 94(3)(a), (c) or (f), by order, require an employer to

(i) employ, continue to employ or permit to return to the duties of his employment any employee or other person whom the employer or any person acting on behalf of the employer has refused to employ or continue to employ, has suspended, transferred, laid off or otherwise discriminated against, or discharged for a reason that is prohibited by one of those paragraphs,

...

(iii) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by that failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer; ..."

The Board therefore declares that Larose-Paquette contravened section 94(3)(a) of the Code and orders it to comply with this section.

Pursuant to the remedial power described above, the Board further rescinds for all purposes the dismissal of March 5, 1990 and orders that Mr. Lafrance be reinstated, as if he had never left his employment, with full compensation until the date of reinstatement.

Mr. Lafrance shall be reinstated in his duties not later than December 17, 1990 or on any other date agreed to by the parties.

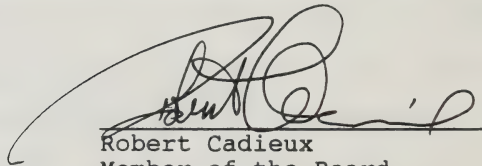
The Board appoints Ms. Debra Robinson, Director of its Montréal office, to assist the parties in implementing the

present decision, or any other officer at the Montréal regional office whom Ms. Robinson might designate.

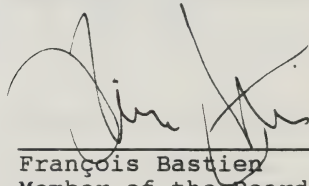
Finally, the Board retains jurisdiction, under section 20(1) of the Code, to take any further remedial action that may prove necessary and to settle any problem that may arise between the parties in implementing this decision.



Serge Brault
Vice-Chairman



Robert Cadieux
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 14th day of December 1990.

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Summary

SYNDICAT DES EMPLOYÉ(ES) DE
TÉLÉVISION ST-AURICE INC. (FNC-
CNTU), APPLICANT, AND TÉLÉVISION
ST-AURICE INC., QUÉBEC, QUÉBEC,
EMPLOYER.

Board File: 555-3183

Decision no.: 841

This case deals with an application for certification filed pursuant to section 24 (part I of the Canada Labour Code), seeking to represent the advertising sales personnel in a radio station. This issue of constitutional jurisdiction (section 2) and status of dependent contractors (section 3) were raised. The application was allowed.

Constitutional jurisdiction.

After examining the evidence, the Board concluded that since the advertising department was an integral part of the television station, it fell under federal jurisdiction. The following decisions were followed: Shamrock Television Station Inc. - CLRB decision no. 639, and Canadian Broadcasting Corporation (Ciné le Matou) - CLRB decision no. 646.

Employee Status.

After analyzing the evidence, the Board concluded that the advertising sales personnel were dependent contractors, and allowed the application. The following decision was followed: Canadian Broadcasting Corporation - CLRB decision no. 383.

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Résumé de décision

SYNDICAT DES EMPLOYÉ(ES) DE
TÉLÉVISION ST-AURICE INC. (FNC-
CSN), REQUÉRANT, ET TÉLÉVISION ST-
MAURICE INC., QUÉBEC (QUÉBEC),
EMPLOYEUR.

Dossier du Conseil: 555-3183

Décision n°: 841

Demande d'accréditation article 24 (Partie I du Code canadien du travail). Vendeurs de publicité station de radio. Compétence constitutionnelle soulevée (article 2). Statut d'entrepreneurs dépendants soulevée (article 3). Requête accueillie.

Compétence constitutionnelle.

Après un examen de la preuve, le Conseil a conclu que le service de publicité était intégré à la station de télévision et donc de compétence fédérale. Jurisprudence suivie. Shamrock Television Station Inc. décision n° 639, Société Radio-Canada (Ciné le Matou) décision n° 646.

Statut d'employés.

Après une analyse de la preuve, le Conseil a conclu que les vendeurs étaient des entrepreneurs dépendants et a accueilli la demande. Jurisprudence suivie. Société Radio-Canada décision n° 383.



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Reasons for decision

Syndicat des employé(e)s de
Télévision St-Maurice Inc.
(FNC-CNTU),

applicant,

and

Télévision Saint-Maurice Inc.,
Québec, Quebec,

employer.

Board File: 555-3183

The Board was composed of Mr. Serge Brault, Vice-Chairman,
as well as Messrs. François Bastien and Robert Cadieux,
Members.

Counsel of record:

Mr. Marius Ménard, for the applicant; and
Mr. André Joli-Coeur, for the employer.

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

I

The proceedings

On September 4, 1990, the Canada Labour Relations Board
received an application for certification made pursuant to
section 24 of the Canada Labour Code (Part I - Industrial
Relations) by the Syndicat des employé(e)s de Télévision
St-Maurice Inc. (FNC-CNTU) (the union) seeking to represent,
as their certified bargaining agent, "all advertising
consultants (sales personnel) who are employees within the
meaning of the Labour Code."

Télévision Saint-Maurice Inc. (the employer) contested the
application on two grounds: first, it argued that the Board
lacked jurisdiction to deal with the application because the

sales activities in question came within provincial jurisdiction; second, it argued that the advertising consultants (sales personnel) sought by the application were not employees within the meaning of the Code. In its opinion, these persons are independent contractors.

The employer requested a hearing. The union did not. The instant application was decided without a public hearing, the Board having determined that the facts contained in the file enabled it to dispose of the case in this manner.

II

The facts

The employer, a television broadcasting company, operates television stations CKTM-TV and CFKM-TV in Trois-Rivières.

Each of the advertising consultants (sales personnel) sought by the application has entered into an individual employment contract with the employer. Under the terms of this contract, each consultant agrees to work personally for the employer (section 1). Other sections provide for exclusivity of employment (section 2), the assigning of a territory and clients and the setting of sales objectives by the employer (section 3), the obligation to be diligent in performing the work (section 4), the surrendering of the proceeds from sales to the employer (section 6), payment of a salary based on commission and performance (sections 7 and 9), holidays based on seniority (section 8), the collection of accounts by the employer (section 10), the participation in the company's group insurance program (section 12) and, finally, unilateral cancellation of the employment contract on thirty days' notice (section 16).

Uncontradicted evidence reveals that the advertising consultants (sales personnel) work in offices provided by the employer, under the immediate supervision of an advertising manager. The evidence also reveals that the cost of the advertising sold is determined by the employer and that as a rule, the advertising manager authorizes contracts before they are signed with the client. The employer promotes its advertising service, does the billing and recovers debts.

Finally, a number of payroll deductions are made from the salary of the consultants: unemployment insurance premiums, Quebec health insurance premiums and contributions to the Quebec pension plan.

III

The Board's constitutional jurisdiction

The employer argues, in contesting the application, that the Board has no constitutional jurisdiction over its business. It alleges that the sector of activity sought by the application, the sale of advertising, is separate and distinct from its television broadcasting operation and does not constitute a "federal work, undertaking or business" within the meaning of the Code. According to the employer, this sector comes within provincial jurisdiction and the Board does not therefore have jurisdiction to entertain the union's application for certification.

The core undertaking operated by the employer is unquestionably within federal jurisdiction because it is a broadcasting station within the meaning of section 2(f) of the Code, which reads as follows:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(f) a radio broadcasting station, ..."

The Board has jurisdiction to hear an application for certification covering employees working for a broadcasting company (Re Radio Reference, [1932] A.C. 304, and Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141).

However, the question the Board has to decide in this case is whether the persons engaged in the sale of advertising, this activity being principally within provincial jurisdiction, are subject to the Board's jurisdiction. To this end, the Board must determine whether the secondary activity, i.e. the sale of advertising, comes within the same constitutional jurisdiction as the core undertaking, which is a broadcasting company.

The ample case law on this question has established certain basic principles that the Board can apply in dealing with the instant case.

First, the Board must reiterate that the decisive criterion in constitutional matters is not the work performed by the employees in respect of whom certification is sought, but the nature of the activities of the "going concern" that employs them (Northern Telecom Limited v. Communications Workers of Canada, [1980] 1 S.C.R. 115; and Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 2 S.C.R. 225). Second, it should also be reiterated that the courts as a

rule oppose the fragmentation of businesses for the purposes of regulating labour relations (Attorney General for Ontario et al. v. Israel Winner et al., [1954] A.C. 541; and Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd. et al., [1979] 2 F.C. 91).

Contrary to the opinion that prevailed for a period of time, the Supreme Court did not resolve all these questions in Canada Labour Relations Board et al. v. Paul L'Anglais et al., [1983] 1 S.C.R. 147. In Shamrock Television System Inc., CKOS-TV and CICC-TV (1987), 70 di 168; and 17 CLRBR (NS) 205 (CLRB no. 639), the Board held that certain activities secondary to the operation of a core broadcasting undertaking were sufficiently integrated into the undertaking to become subject to the provisions of the Code. The activities in question were the image creative services, sales department and office administration of a television station. The Board held that these departments were operated as an integral part of the broadcasting undertaking and therefore came within federal jurisdiction:

"The instant case comes very close to the kind of situation cited by the Federal Court of Appeal in Wardair. In effect, where an airline has another undertaking sell tickets for it, that undertaking does not necessarily come under federal labour relations jurisdiction. But where the airline employs people directly to sell tickets, 'as an integral part' of the airline undertaking, that group does come under federal labour relations jurisdiction.

...

The Board concludes, on the basis of the facts and the law, that these three divisions or departments of Shamrock at Yorkton - Image Creative Services, sales department and office administration - are within federal labour relations jurisdiction."

(pages 184; and 221-222)

In Canadian Broadcasting Corporation (Ciné le Matou Inc.) (1987), 71 di 12 (CLRB no. 646), the Board, applying the

same rules, dismissed an application precisely because the undertaking in question was not integrated.

As was the case in Shamrock, the employer sells its own advertising through an integrated advertising sales service. This is sufficient to enable the Board to conclude that, in this case, there is a single, integrated and indivisible broadcasting undertaking. In other words, a federal undertaking.

The Board therefore concludes that it has jurisdiction to deal with the application for certification filed by the union.

IV

Status of the persons sought by the application for certification

The employer questions the employee status of the persons sought by the application for certification. It considers them independent contractors. Section 3(1) of the Code defines a dependent contractor as follows:

"'dependent contractor' means

...

(c) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that he is, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person."

The Code emphasizes economic dependence and subordination to distinguish the dependent contractor from the independent contractor. The degree of economic dependence of a person is always a factual question related to the nature of that person's activities. To assess the dependence of an

employment relationship between two persons, the Board examines, among other things, whether there is exclusivity of employment, freedom in the performance of the work, control of assets and sharing of risks (see Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRBR no. 383)).

In the instant case, the contract of employment of each advertising consultant (sales person) contains an exclusivity of employment provision that is to the employer's advantage. This first element is a sign of economic dependence because the sales personnel do not have the freedom to carry on their activities for the benefit of other undertakings.

The professional activities of the advertising consultants are structured by the employer. In fact, it assigns them territories and clients, sets objectives and advertising rates, and must approve contracts before they are signed. These too are specific indications of an employment relationship that subordinates the sales personnel to the employer.

Moreover, the advertising consultants work on the employer's premises and, according to the evidence, do not provide any capital or staff. Often a self-employed person will find himself in the reverse situation of having to invest in work tools in order to generate income.

The advertising consultants assume very few risks in the undertaking. The employer handles the promotional work and sets the rates. It receives the proceeds from sales and does the billing and collecting of debts.

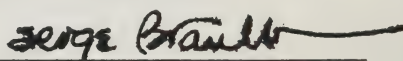
Finally, the employer assigns vacation based on seniority and contributes to various social benefits. All this indicates that the contracting parties perceive their relationship as necessarily comprising the traditional characteristics of a contract of employment between employee and employer.

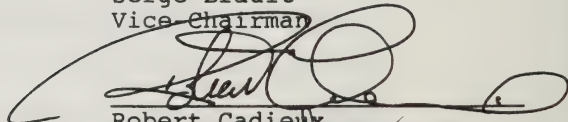
Their working conditions and their relations with the employer lead us necessarily to conclude that these advertising consultants are dependent contractors and hence employees within the meaning of the Code.


V

Conclusion

Having examined the file in its entirety, the Board is satisfied that the application for certification meets the requirements of section 24 of the Code and it grants such application. An order will be issued accordingly.


Serge Brault
Vice Chairman


Robert Cadioux
Member of the Board


François Bastien
Member of the Board

ISSUED at Ottawa, this 20th day of December 1990.

information

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SUMMARY

NORMAND BILODEAU AND PIERRE PERRON, APPLICANTS, TRANSPORT PAPINEAU INC., EMPLOYER, AND TRANSPORT DRIVERS, WAREHOUSEMEN AND GENERAL WORKERS' UNION, LOCAL 106, UNION.

Board Files: 745-3583
745-3695

Decision No.: 842

RÉSUMÉ

NORMAND BILODEAU ET PIERRE PERRON, PLAIGNANTS, TRANSPORT PAPINEAU INC., EMPLOYEUR, ET UNION DES CHAUFFEURS DE CAMIONS, HOMMES D'ENTREPOTS ET AUTRES OUVRIERS, SECTION LOCALE 106, SYNDICAT.

Dossiers du Conseil : 745-3583
745-3695

Décision n° : 842

File No. 745-3583

The Board found that the employer, Transport Papineau Inc., had dismissed the complainant for a reason other than the exercise of rights under the Code. It reviewed the rules concerning the Board's power to consider the correlation between the disciplinary action imposed on an employee and the nature of the alleged infraction.

File No. 745-3695

The Board ordered the reinstatement of the complainant. The employer did not establish that it had terminated the complainant's employment for a reason other than his union activities.

Dossier n° 745-3583

Le Conseil a jugé que l'employeur Transport Papineau Inc. avait congédié le plaignant pour un autre motif que l'exercice de droits prévus au Code. A cette occasion, le Conseil a passé en revue les règles relatives à son pouvoir d'examiner la proportionnalité de la sanction imposée à un employé, par rapport à la nature de l'infraction reprochée.

Dossier n° 745-3695

Le Conseil a ordonné la réintégration du plaignant. L'employeur n'a pas fait la preuve de l'existence d'un motif autre que les activités syndicales du plaignant pour fonder sa décision de mettre fin à son emploi.



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Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Normand Bilodeau and
Pierre Perron,

complainants,

Transport Papineau Inc.,
employer,

and

Transport Drivers,
Warehousemen and General
Workers' Union, Local 106,
union.

Board Files: 745-3583
745-3695

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. Robert Cadieux and François Bastien, Members.

Appearances:

Mr. Claude Auclair, accompanied by Mr. Gilles Beaupré, for the employer; and
Ms. Claire Fortin, accompanied by Mr. Serge Saumur, for the complainant.

These reasons for decision were written by Louise Doyon, Vice-Chair. They are further to an interim decision of October 10, 1990 in which the Board dismissed Normand Bilodeau's complaint of unfair labour practice and allowed Pierre Perron's.

Hearings were held in Val-d'Or on August 23 and 24, 1990 and in Montréal on September 12, 1990.

FILE 745-3583: NORMAND BILODEAU

I

The matter at issue

Normand Bilodeau, who has been an employee of Transport Papineau Inc. since March 20, 1989, filed with the Board a complaint of unfair labour practice alleging that the employer contravened the provisions of the Canada Labour Code by suspending and dismissing him for his union activities.

The employer, for its part, maintains that it dismissed Mr. Bilodeau because of his disciplinary record. Initially the employer suspended Mr. Bilodeau on February 12, 1990 and dismissed him on February 26, 1990. The employer denies dismissing Mr. Bilodeau because of his union activities.

II

The evidence

The evidence and arguments presented by the employer can be summarized as follows.

- (1) Transport Papineau Inc. is a general trucking company with headquarters in Saint-Jérôme and terminals in Saint-Jérôme, Mont-Laurier, Rouyn and Val-d'Or. The complainant worked at the Val-d'Or facility.
- (2) Employees at the Val-d'Or terminal perform three types of duties: warehouse work, i.e loading and unloading vehicles; local daytime trucking in the Val-d'Or area; and finally, long-haul trucking always at night.

Mr. Bilodeau performed all these duties during his period of employment.

- (3) At the time of his dismissal, the complainant was assigned to night-time long-haul trucking. He was making round trips between Val-d'Or and North Bay and Val-d'Or and Mont-Laurier. Mr. Bilodeau might also be assigned by the employer to work mornings in the warehouse, a few hours a day, as soon as he completed his road trips.
- (4) The employer decided to suspend and later to dismiss Mr. Bilodeau because, it alleges, on Friday evening, February 9, 1990, he reported for work intoxicated and was incapable of performing his duties. The employer further alleges that it took into consideration the complainant's disciplinary record.
- (5) Between October 5, 1989 and February 9, 1990, Mr. Bilodeau received five written notices reprimanding him, among other things, for tardiness and unauthorized absences. One of these notices states that the complainant reported for duty intoxicated on Friday evening, December 15, 1989, when he was assigned to night-time long-haul trucking. The employer forbade him to make his run. Paul-Emile Groleau, who is in charge of the Val-d'Or terminal, stated that he had wanted to dismiss Mr. Bilodeau following this incident, given the seriousness of the offence, but that Marcel Larivière, manager of the company's Saint-Jerôme operations, told him that it would be better, at that point, not to take disciplinary action against Mr. Bilodeau because he was very deeply involved in the union organizing campaign. In these circumstances, the employer had to be careful. However, when the

complainant reported for work in the same condition on February 9, 1990, Mr. Groleau felt that the problem had become critical and decided on February 12 to suspend Mr. Bilodeau and conduct an investigation. On February 26, 1990, Mr. Larivière notified Mr. Bilodeau in writing of his dismissal.

- (6) The employer had known since October 1989 that Mr. Bilodeau was involved in union activities. It knew specifically that Mr. Bilodeau had close ties with the Transport Drivers, Warehousemen and General Workers' Union, Local 106 (Teamsters Local 106), and served as organizer and spokesperson for this union during the organizing campaign that took place in the fall of 1989 at the Rouyn and Val-d'Or facilities. Mr. Groleau admitted that on numerous occasions during this period he had discussed the establishment of a union with Mr. Bilodeau.
- (7) The employer also alleged that after February 12, 1990, Mr. Bilodeau sent the employer and Mr. Groleau three anonymous letters. The first letter was received by Mr. Groleau on or about February 23, whereas the other two were received after the dismissal. The employer called a handwriting expert as a witness. This witness was of the opinion that the letters were in fact written by Normand Bilodeau. The written notice of dismissal, however, makes no mention of these letters. The union objected strongly to the submission in evidence and the relevance of these anonymous letters and to the handwriting expert's testimony. The Board took these objections under advisement.

The employer argued, on the strength of the foregoing evidence, that it did not dismiss Mr. Bilodeau

unlawfully. It acted after repeatedly warning him to change his behaviour and attitude. Reporting for duty intoxicated twice, when he was assigned to long-haul trucking, was totally unacceptable and this situation was a key factor in the employer's decision, given the nature of Mr. Bilodeau's duties. The employer stressed that serving as a union representative was no guarantee whatsoever that behaviour and attitudes on the job that were incompatible with the performance of one's duties would be tolerated. The employer added that it was in no way motivated by anti-union animus. On the contrary, witnesses for the employer testified that it would have dismissed Mr. Bilodeau as early as December 15, 1989 had it not been for Mr. Larivière's reluctance to do so.

The complainant, for his part, presented the following evidence.

- (1) Early in the fall of 1989, the employees at the Val-d'Or terminal expressed the wish to unionize. During informal discussions among the employees, the question arose of whether, if the employees decided to join a union, they would choose the Association des chauffeurs de Transport Papineau, already certified to represent employees at the Saint-Jérôme and Mont-Laurier terminals, or Teamsters Local 106.
- (2) At the beginning of October 1989, the complainant was in contact with the representative of Teamsters Local 106. It was then agreed that Mr. Bilodeau would organize a union meeting for employees at the Val-d'Or and Rouyn terminals and that representatives of both Teamsters Local 106 and the Association des chauffeurs

de Transport Papineau would attend. This meeting in fact took place on October 28, 1989.

- (3) At this meeting, after a representative of each union described his association, the employees of the Val-d'Or terminal indicated their preference for Teamsters Local 106. Normand Bilodeau was designated as the representative of this group. During the meeting, union membership cards were signed in support of Teamsters Local 106, which applied for certification on October 31, 1989.

- (4) On the following Monday, Mr. Groleau summoned Mr. Bilodeau to his office and pointed out that he should not have conducted the vote to choose a union by a show of hands because this was not democratic. He is said to have added, "We're going to have problems with the Teamsters."

Shortly after this meeting, Mr. Groleau invited Mr. Bilodeau to lunch to discuss union matters.

- (5) In January 1990, Mr. Bilodeau called a second meeting of all the drivers at the Val-d'Or terminal to explain to them the contents of the collective agreement of the Association des chauffeurs de Transport Papineau and the contents of the collective agreement signed by Teamsters Local 106 in the Abitibi region. Following this meeting, Mr. Groleau apparently summoned Mr. Bilodeau to his office to tell him that he had not correctly explained the contracts and that as a result, "they were going to have problems."

- (6) As union representative, Mr. Bilodeau approached Mr. Groleau between October and February to discuss the

employees' working conditions and demands. Six or seven times during this period, Mr. Bilodeau discussed union business with Mr. Groleau. Each time, their discussions were work-related.

- (7) Regarding his disciplinary record and the disciplinary notices in his file, Mr. Bilodeau did not deny that on a number of occasions he was in fact late for or absent from work without notifying his superior, contrary to company directives.
- (8) Concerning the incident on December 15, 1989, Mr. Bilodeau denied reporting for duty intoxicated and stated that that evening, he made the round trip between Val-d'Or and Mont-Laurier, in accordance with his work schedule. However, he admitted that his road sheet showed that he arrived at work at 9:45 p.m., some three hours late. He also admitted that his road sheet did not contain any information on the trip he made between Val-d'Or and Mont-Laurier, as is customary, that no return time was indicated and that his road sheet was not signed. He was not paid for this period of work. According to him, this was because he had not signed his road sheet: it was therefore normal that he not be paid for the work performed. In answer to a question from counsel for the employer, he affirmed, he had in fact worked for nothing that day.

Regarding the incident on February 9, 1990, Mr. Bilodeau stated that he arrived at work some 15 minutes late, around 6:45 p.m. On this occasion, he said, Mr. Groleau claimed that he was intoxicated and told him that there was no question of his making his run in this condition. He was sent home.

Explaining his condition on February 9, 1990, Mr. Bilodeau stated that he was probably tired when he reported for duty because in the preceding days, he not only had been assigned to night-time long-haul trucking, but also had worked mornings in the warehouse. The record of hours worked from February 5 to 9 does not indicate that Mr. Bilodeau worked mornings that week on completion of his run.

With regard to the anonymous letters, Mr. Bilodeau also vehemently denied writing and posting them. The union did not present any expert testimony to counter that presented by the employer regarding the origin of these handwritten documents.

III

The decision

When examining the merits of a complaint of unfair labour practice, the Board must be satisfied that the employer has not taken actions to limit or impede the legitimate exercise by employees of the rights conferred by the Code. The employer's actions must not be motivated by anti-union animus, but must be for cause. This does not mean, however, that it is up to the Board to determine whether the reasons given by the employer to justify the action are valid, fair and commensurate with the seriousness of the alleged offence. The Board has no authority to determine whether the penalty imposed is commensurate with the alleged offence (see Services Ménagers Roy Ltée (1981), 43 di 212 (CLRB no. 308); and Pierre Fiset (1985), 55 di 233; and 85 CLLC 14,041 (CLRB no. 473)).

The Board, however, can examine the nature of the cause alleged by the employer, not to assess its fairness or determine its validity having regard to the context in which it is alleged, but to determine whether it has the appearance of a pretext. This approach enables the Board to satisfy itself that this is indeed the real reason for the penalty and not an excuse or a pretext that masks anti-union animus. The Board said the following on this subject in Iberia Airlines of Spain (1988), 74 di 153; and 90 CLLC 16,048 (CLRB no. 700):

"... The Board's role in this case is not to substitute its judgment for that of the employer, but rather to analyse the relationship of the penalty imposed on the complainant to the offence alleged against her, with a view to identifying the motive for the action."

(pages 162; and 14,413)

It then referred to the opinion expressed in Cablevision du Nord de Québec Inc. (1988), 73 di 173 (CLRB no. 681):

"The Board does not as such have to deal with the fairness, sufficiency or even reasonableness of an administrative decision (see, however, Oshawa Flying Club (1981), 42 di 306; and [1981] 2 Can LRBR 95 (CLRB no. 293); and Canada Labour Relations Board Policies and Procedures, supra, page 247). However, the more uncharacteristic an action is of an average employer's behaviour, the less likely it is that the employer's evidence will be convincing."

(page 177)

[See also Riquaud Transport Inc. (1986), 68 di 89 (CLRB no. 605.)]

Similarly, the Quebec Labour Court, in a case where it had to interpret the provisions of the Quebec Labour Code that are the counterpart of our section 94(3)(a)(i), had the following to say in Jacques Nepveu c. Commission de la construction du Québec, [1989] T.T. 80:

"The Court does not have the right to interfere in the employer's decision concerning the severity of the penalty imposed, unless this penalty is so extreme or manufactured as to constitute a pretext. ..."

(page 83; translation)

The testimonial evidence presented to the Board is contradictory in many respects and on many key points. The Board therefore had to address the question of the credibility of the witnesses. After reviewing all the evidence, the Board concludes that Mr. Bilodeau's testimony is not credible on a number of key points and that it can give no credence to his version of the facts.

With regard to the incident on December 15, 1989, the Board does not believe that Mr. Bilodeau did in fact perform his duties on this date. There is too much basic information missing from his road sheet (e.g. the time of his return, relevant information on the progress of the trip, his signature) to conclude that he simply made an error. Nor does the Board believe the complainant's statement that he agreed to work "for nothing" on December 15, 1989. This argument not only makes no sense, but also is completely farfetched given the union organizing campaign that was under way at the time and Mr. Bilodeau's active role as a union representative. The Board therefore accepts the employer's version of the incident on December 15, 1989.

The same applies to the incident on February 9, 1990. According to the complainant, his extreme fatigue could have misled Mr. Groleau into thinking that his condition or behaviour was the result of his consuming alcohol. This explanation is not supported by the evidence. The complainant telephoned twice during the afternoon to make sure that his truck was in good operating condition. During the second telephone call, he told fellow worker Lapierre

that he was going to have supper and then report for duty. He nevertheless reported late for work. Mr. Lapierre, for his part, following the second telephone call, notified Mr. Groleau and asked him to wait until Mr. Bilodeau arrived because he found that "his voice did not sound normal."

At the hearing, Mr. Lapierre tried to downplay the significance of the written statement he signed on February 9, 1990, the same day the incident took place. In particular, he tried to downplay the following part of his statement: "Mr. Groleau refused to let him leave because of his condition," the reference being to the consumption of alcohol. The Board can understand Mr. Lapierre's discomfort at being confronted with this statement at a public hearing. This, however, does not prevent us from giving credence to his version of events. Mr. Lapierre signed the statement of his own accord and it is corroborated by Mr. Groleau's version.

Moreover, Mr. Bilodeau's claim that he was tired from working mornings in the warehouse during the week of February 5 to 9 is not supported by the evidence. The record of the hours the complainant worked on those days makes no mention of this work. The employer's version, that Mr. Bilodeau was incapable of performing his duties on February 9, 1990 because he was intoxicated, is more plausible than Mr. Bilodeau's. The Board believes that the employer proved its allegations concerning this incident.

Mr. Bilodeau testified concerning other actions that make up his disciplinary record. Among them, the incident of January 15, 1990 is of particular interest. The employer alleges that Mr. Bilodeau did not sleep before working his shift that evening and, as a result, the round trip between Val-d'Or and North Bay took him 19 hours. To explain this

situation, Mr. Bilodeau pointed to a mechanical breakdown that delayed his arrival in North Bay and his decision to stop and sleep a few hours during the return trip since he was tired. There is no mention of any of these stops on the road sheet. The complainant explained in this regard that payment for time lost is at the employer's discretion, and that the employer's practice is not to pay drivers for this time. This is why he did not record these stops on his road sheet. The evidence, however, reveals that Mr. Bilodeau's road sheets for January 9 and 17, 1990, the same period of time, show forced stops caused by mechanical problems encountered on the road. The Board does not accept the version given by Mr. Bilodeau to explain the events of January 15. Finally, Mr. Bilodeau stated that he always notified his superior of his absences.

Mr. Bilodeau testified concerning his union activities. His testimony was clear and precise. He explained the different phases of the organizing campaign, the role he played and the nature of his relations with Mr. Groleau in dealing with union matters during this period. This part of Mr. Bilodeau's testimony differed markedly from the testimony we have just related, one characterized by imprecision, uncertainty and contradictions. This confirms how little credence can be given to Mr. Bilodeau's statements concerning the employer's alleged reason for terminating his employment.

Having said this, the Board has no doubt that the employer was aware of the union organizing campaign and followed its progress closely. The testimony of various employees and of Mr. Bilodeau on this subject is clear. The complainant alleged that the employer tried to influence the employees' decision on union membership, thereby contravening the Code and displaying anti-union animus. It was alleged in this

regard that the employees discussed on numerous occasions the possibility of filing complaints of unfair labour practice with the Board over these actions by the employer. The Board never received any such complaints. This is why it refused to admit evidence of the employees' intentions in this regard. Yet, evidence establishing that the employer had interfered in the affairs of the employees or threatened them would have been admissible in the context of the present complaint. However, this evidence was not adduced.

In view of the Board's conclusion on the merits of Mr. Bilodeau's complaint, there is no reason to make a formal ruling on the objections it took under advisement concerning the admissibility of the anonymous letters.

For all these reasons, the Board decided in its interim decision that the employer had established, through a preponderance of evidence, that it dismissed the complainant, not because he exercised rights conferred by the Code, but for another reason.

FILE 745-3695: PIERRE PERRON

I

The matter at issue

Pierre Perron, who has been employed by Transport Papineau Inc. as a freight handler's helper since May 16, 1989, alleges that he was unlawfully dismissed for engaging in activities that are protected by the Code. On July 6, 1990, Mr. Perron filed a complaint of unfair labour practice with the Board.

II

The evidence

All the evidence presented in Normand Bilodeau's case concerning the nature of the company, its structure, the conduct of the union organizing campaign and Mr. Perron's union activities was added to this file.

The evidence and arguments presented by the employer can be summarized as follows.

- (1) Pierre Perron was assigned to warehouse work, i.e. loading and unloading trucks. This work begins early in the morning, at 5:30 a.m., and ends at noon or early in the afternoon, depending on the volume of work.
- (2) The employer dismissed Mr. Perron for absenteeism and tardiness, the history of which is as follows. On September 29, 1989, Mr. Perron was absent from work, and on October 4, 1989, he was an hour and a half late for work. The penalty imposed for the former offence was a written warning, and for the latter offence, a one-day suspension. On December 8, 1989, Mr. Perron was absent from work, for which he was suspended for five days in December 1989. Finally, on June 8, 1990, Mr. Perron did not report for work, and this after having reported for work a few minutes late on the preceding days. His absence on June 8, 1990 led to his dismissal.
- (3) The employer alleges that it did not know of Mr. Perron's union activities. Specifically, Denis Nicol, foreman and Mr. Perron's immediate superior, stated that he had no knowledge of them.

In support of its decision to dismiss Mr. Perron, the employer argued that the complainant's chronic absenteeism and tardiness and the warnings he received were proof that it dismissed him, not for his union activities, but for another reason.

The employer further argued that punctuality was essential in the position Mr. Perron occupied. The work of unloading trucks in the morning must be performed continuously and without interruption because there was a corresponding delay in the preparation of trucks to transport goods locally during the day if these trucks could not be loaded within the time allotted.

The employer also cited, as a ground of dismissal, Mr. Perron's general attitude on the job, in particular his nonchalance and lack of interest in his work. The union objected to this evidence, noting that none of the written notices, apart from the notice of September 20, 1989 concerning the breakage of goods, made any mention of incompetence or undesirable behaviour on the job. The Board asked the employer to confine its evidence to the facts set out in the notice of dismissal.

Finally, the employer argued that it applied the theory of progressive discipline, and this was clear proof that it did not act without due consideration.

Mr. Perron, for his part, presented the following evidence.

- (1) Regarding the disciplinary notices for absenteeism and tardiness, Mr. Perron did not categorically deny committing these offences. However, he explained that in some of these situations, including his absence on

September 29, 1989, he tried unsuccessfully to contact his foreman in the morning.

- (2) Mr. Perron joined Teamsters Local 106 in the fall of 1989 and attended the meetings called by the union.
- (3) Mr. Perron stated that in February 1990, he began serving as an intermediary between the employees who were members of the Teamsters and his father-in-law, Normand Bilodeau, who as we know was dismissed on February 9, 1990. He gave the following description of his role as an intermediary. When employees had problems resulting from decisions made by the employer or encounters with Mr. Groleau, they informed him so that he could pass the information on to Mr. Bilodeau. Mr. Perron cited a number of specific situations where he played this role. In answer to the employer's claim that it did not know of his union activities, Mr. Perron stated that it was highly unlikely, in his opinion, that such was the case: first, because of his family situation; and, second, because in a company like Transport Papineau Inc., there are "leaks."

Counsel for the complainant argued that in dismissing Mr. Perron on June 11, 1990, the employer committed an unlawful act that was motivated by anti-union animus. The events since February 9, 1990, subsequent to Mr. Bilodeau's dismissal and the role played by Mr. Perron, were, given the context, determining factors. Moreover, the nature of the penalty imposed, i.e. a dismissal for a single day's absence, when the complainant had behaved correctly in the preceding six months, had the appearance of a reprisal designed to prevent Mr. Perron from exercising his rights under the Code.

III

The decision

The Board explained in the Bilodeau decision the rules it must follow in exercising its jurisdiction where it has to decide complaints of unfair labour practice. These rules apply here.

The Board decided, in its interim decision of October 10, 1990, that the employer's dismissal of Mr. Perron contravened the Code. An examination of the grounds alleged by the employer, in particular the incident of June 8, 1990, has persuaded the Board that this ground was a pretext, having regard to Mr. Perron's work and the context in which the employees at the Val-d'Or terminal were at the time exercising their rights under the Code. The point at which this decision was made, i.e. when the complainant had changed his behaviour during the preceding six months, during which time no further disciplinary action was taken against him, is evidence that this was an excuse and behaviour that was tainted by anti-union animus.

The Board does not believe that the employer was unaware of Mr. Perron's union activities, and particularly the role of intermediary he had been playing since his father-in-law's dismissal. The public and adversarial nature of the union organizing campaign and the interest shown by the employer in this matter leave no doubt that the employer knew of Mr. Perron's activities.

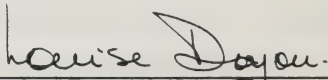
The employer claims that it acted in accordance with established labour relations practices. The measure imposed on June 8, it argues, was in keeping with the theory of progressive discipline and was warranted in the light of Mr. Perron's record. In support of these arguments, the

employer filed a series of arbitral awards indicating that the nature of the misconduct alleged against Mr. Perron was just and sufficient cause for dismissal. The Board, however, does not have to decide whether the cause was just and sufficient. It will examine the severity of the penalty imposed in relation to the alleged offence only to determine whether it was a pretext or the real cause. In the instant case, the severity of the penalty reveals that the alleged cause was a pretext.

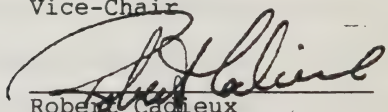
For all these reasons, the Board allowed the complaint of unfair labour practice in its interim decision of October 10, 1990.

Accordingly, the Board orders the employer to reinstate Pierre Perron in his duties and to compensate him for the pay and other benefits he lost as a result of his dismissal.

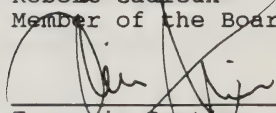
The Board designates Ms. Suzanne Pichette, senior labour relations officer, to assist the parties in implementing the above orders. The Board retains jurisdiction to settle any question that may arise in implementing these orders.



Louise Doyon
Vice-Chair



Robert Cadieux
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 20th day of December 1990.

information

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used for legal purposes.

Summary

BRITISH COLUMBIA GOVERNMENT EMPLOYEES'
UNION, APPLICANT; AND CANADIAN
IMPERIAL BANK OF COMMERCE (POWELL
RIVER BRANCH), EMPLOYER.

Board File: 530-1876

Decision No.: 843

These reasons deal with an application
for review in which the union seeks
to include casual employees in a
bargaining unit with regular full-time
and part-time employees. The
application affects a single branch
bargaining unit in the banking
industry where the Board has shown a
preference in the past to exclude
casuals.

The application was granted.

In its reasons, the Board discusses
the concerns it has about casual
employees and the possible negative
impact they could have on the free
collective bargaining system. The
Board does, however, acknowledge that
casuals are employees within the
meaning of the Code and that they are
entitled to participate in collective
bargaining. The problem then becomes
one of balancing the rights of the
casuals to those of the regular full-
time and part-time employees depending
on the particular circumstances before
the Board.

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peuvent être utilisés à des fins
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Résumé de Décision

SYNDICAT DES FONCTIONNAIRES
PROVINCIAUX DE LA COLOMBIE-
BRITANNIQUE, REQUÉRANT; ET BANQUE DE
COMMERCE CANADIENNE IMPÉRIALE
(SUCCURSALE DE POWELL RIVER),
EMPLOYEUR.

Dossier du Conseil: 530-1876

N° de Décision: 843

Les présents motifs traitent d'une
demande de révision par laquelle le
syndicat cherche à obtenir l'inclusion
des employés occasionnels dans l'unité
de négociation regroupant des employés
permanents à temps plein et à temps
partiel. La demande vise une unité
de négociation comprenant les employés
d'une seule succursale dans le secteur
bancaire, secteur où le Conseil a
auparavant eu tendance à exclure les
employés occasionnels.

La demande a été accordée.

Dans ses motifs, le Conseil explique
les inquiétudes qu'il a au sujet des
employés occasionnels et les
conséquences négatives que ces
derniers pourraient avoir sur le
système de négociation collective
libre. Le Conseil reconnaît cependant
que les employés occasionnels sont des
employés au sens du Code et qu'ils ont
le droit de participer à la
négociation collective. Il s'agit
donc d'équilibrer les droits des
occasionnels et ceux des employés
permanents à temps plein et à temps
partiel selon les circonstances
particulières de l'affaire présentée
au Conseil.



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Travail

Reasons for decision

British Columbia Government
Employees' Union,

applicant,

and

Canadian Imperial Bank of
Commerce (Powell River Branch),

employer.

Board File: 530-1876

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. James E. Dorsey and Ms. Annabelle Donovan, for the applicant; and

Mr. Peter R. Sheen and Ms. Laurie Price, for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

This is an application under section 18 of the Canada Labour Act (Part I - Industrial Relations) wherein the British Columbia Government Employees' Union (BCGEU or the union) seeks to amend its certification order affecting the employees at the Powell River Branch of the Canadian Imperial Bank of Commerce (CIBC or the employer) by adding casual employees to the scope of the bargaining unit.

The BCGEU obtained bargaining rights for this bargaining unit by way of successor rights in September 1990 when it assumed the jurisdiction for bank employees in British Columbia and the Yukon Territory. This jurisdiction was previously held by the Union of Bank Employees (British Columbia and Yukon) Local 2100, Canadian Labour Congress (UBE). The Board approved this transfer of jurisdiction by order dated September 10, 1990 (Board file 580-98).

The UBE was originally granted bargaining rights for CIBC employees at Powell River on February 4, 1986. At that time CIBC's operations included a branch at 4699 Marine Avenue and two satellite branches at 5831 Ash Street and at Gilles Bay. The bargaining unit in the Board's certification order of February 4, 1986 read as follows:

"all employees of the Canadian Imperial Bank of Commerce employed at its Westview Branch, 4699 Marine Avenue, Powell River, B.C., and at its Ash & Walnut and Gillies Bay Consumer Branches (Satellite Branches) located at 5831 Ash Street, Powell River, B.C., and Gillies Bay, B.C., respectively, excluding manager, assistant manager, administration officer and casual employees".

(emphasis added)

Since then the operations of the CIBC at Powell River have been amalgamated at a single location at 71-7100 Alberni Street. When the BCGEU took over the bargaining rights from the UBE all of the affected employees were working at the new location.

When dealing with the successor rights application in September 1990, the Board took note of the amalgamated operations and directed its investigative staff to canvass

the parties concerning the exclusions to be contained in the bargaining unit description in the amended certification order. At that time the parties had just concluded a series of collective bargaining meetings. One of the issues raised during these negotiations by the BCGEU was the inclusion of casual employees within the scope of the collective agreement. The employer would not agree to the inclusion of casuals so the union decided to leave the status quo as it was in the collective agreement and to come to the Board with this application to amend the certification order to include casuals. The issue before us is whether it is appropriate at this time to include casual employees in the existing bargaining unit along with the full-time and part-time employees.

A hearing was conducted into this issue at Vancouver on December 19, 1990.

II

What do we mean when we refer to casual employees? Generally speaking, this term has been used to describe employees who are employed on a call-in basis. Usually these employees work very irregular hours as required. When they are called by an employer about their availability for work there is no obligation for them to accept the hours offered. Conversely, there is no obligation upon the employer to call the casuals to work. Normally casuals are paid on an hourly basis plus the minimum percentage of vacation pay. They are not usually entitled to any other benefits.

Much has been written by this Board and other Boards about the advisability of including employees who do not work a regular full-time schedule with those who do. Prominent amongst this Board's writings on this topic are: Cablevision Nationale Ltée (1978), 25 di 422; and [1979] 3 Can LRBR 267 (CLRB no. 135); Banque de Montréal (Sherbrooke) (1987), 69 di 102; 19 CLRBR (NS) 112; and 87 CLLC 16,044 (CLRB no. 621); and Pacific Western Airlines Ltd. (1984) 56 di 173; 7 CLRBR (NS) 346; and 84 CLLC 16,040 (CLRB no. 471). What can be drawn from those decisions are several principles which will influence the Board when it is faced with the problem of including or excluding casual employees from bargaining units. Some major concerns for the Board are:

- (1) The possibility of casual employees preventing full-time employees from having access to collective bargaining. This situation could arise where the full-time employees are outnumbered by casuals who may not be interested in participating in collective bargaining. If the Board were to insist on the inclusion of casuals in these circumstances the smaller group of full-time employees who may opt for collective bargaining could have their attempts to do so vetoed by the contrary wishes of the casuals.
- (2) There is a possible negative impact on the free collective bargaining process if casuals are included because in most cases casual employees have a different community of interest from regular full-time or regular part-time employees. Obviously, the bargaining strength of regular employees would be considerably diluted if the bargaining unit was flooded with

casuals. These casuals could not be expected to support strike action over issues such as seniority or pensions which have more impact on the employment of regular employees.

- (3) The Board is also hesitant to confer full collective bargaining rights, including the right to halt operations by strike action, on small groups of casual employees who only have a marginal connection with a given industry.

For these reasons as well as others, the Board has shown a preference for excluding casuals from bargaining units, particularly when dealing with new applications where there are no established collective bargaining relationships.

Notwithstanding the Board's stated preference for bargaining unit construction excluding casuals, the fact remains that casuals are employees within the meaning of the Code and they do have the rights and protections bestowed upon employees by the statute. The Board's dilemma has been how to balance the rights of casual employees with those of regular employees and this can only be done depending upon the particular circumstances of any given case. One example of where the Board did include casuals in a bargaining unit with full and part-time employees is Pacific Western Airlines Ltd., supra. There the Board found it appropriate to include so many casuals in a bargaining unit containing 960 or so regular employees. In that instance the Board was also dealing with an application for review where there was an established collective bargaining relationship. There the Board expressed its satisfaction that the usual concerns about including casuals were alleviated in the circumstances

before it, i.e., there was no opportunity for the casuals to prevent regular employees from exercising their rights under the Code as they were already organized. Also, there was little possibility of the casuals dominating the bargaining unit because of the large number of regular employees in the unit as opposed to the number of casuals being sought to be added.

In that decision the Board emphasized the importance of identifying a real community of interest between the casuals and the other employees in the bargaining unit. The Board also said that an important consideration is the continuity or the pattern of employment of the casuals notwithstanding the irregularity of the hours worked:

"What of the general community of interest between regular and casual employees? That will, of course, vary from case to case. Where there is a high turnover of casuals, or where there are long intervals between periods of work by casuals, it becomes particularly difficult to see where the community of interest lies. On the other hand, where, despite the irregularity of hours, there is, as here, a certain continuity over time in the employment of casuals, it is much easier to see how there could be a community of interest between regulars and casuals."

(pages 178, 351, and 14,344)

We concur with that view that the continuity of employment should be a telling factor. If an employer has created a regular standby pool of employees upon which it relies to do its extra production work or to fill in for its regular staff on an ongoing basis, this pool of employees should be viewed as an integral part of the employer's workforce. This is not like an employer calling office overload or the likes to fill an occasional vacancy or to deal with an unforeseen increase in the workload.

The last point we feel we should highlight from Pacific Western Airlines Ltd., supra, are the six (6) factors set out at pages 181, 354, and 14,346 which convinced the Board that it was appropriate to include the casual employees at Prince George, B.C. in the system-wide bargaining unit at Pacific Western:

"The Board concludes that a combined unit is appropriate upon taking into account the following factors: (1) the number of casuals is small compared to the whole unit so that there is no danger of casuals dominating the unit at the expense of regular employees; (2) the casuals perform essentially the same work as a significant portion of the existing bargaining unit; (3) the working hours of the casuals, though irregular, show a certain continuity over time; the casuals do have a continuing relationship with PWA; (4) factors (2) and (3) reveal a genuine community of interest between casual and regular employees; (5) this is a review application in which casuals are sought to be added, rather than an original certification application, so that there is no question of casuals affecting the right of regular employees to bargain collectively; and (6) the majority of casuals wish to be represented by CALEA."

While factors (1) through (5) are important to consider when faced with this question of the appropriateness of including casuals in a bargaining unit, it is our respectful opinion that factor (6) is prime. This is one time where the Board should be very conscious of the wishes of the employee group which is under consideration for inclusion. Casual employees should not be swept into bargaining units on the whim of an employer who may wish to flood the bargaining unit for its own particular reasons, nor should they be included merely on the strength of the union's support amongst the regular employees.

III

The BCGEU used this case to attempt to persuade us that the time is ripe for the Board to change its policy approach to casual employees. The union placed before us documents which clearly show a trend towards an increase in the use of part-time and casual employees who do not have access to collective bargaining and who have no benefits other than wages and vacation pay. The union referred us to the following studies into this phenomenon in Canadian industries and particularly in the service industry into which banking falls:

Maureen Baker and Patricia Begin, Part-Time Work (Library of Parliament Research Branch - Political and Social Affairs Division) (1990)

Mary Lou Coates, Part-Time Employment: Labour Market Flexibility and Equity Issues (1988)

Harry MacKay, Part-Time Work in Canada -A Submission to the Advisory Council, Employment and Immigration Canada from the Canadian Council on Social Development (1980)

Fran Shaver, Part-Time Work; Part-Time Rights - A Brief Presented to the Commission of Inquiry into Part-Time Work by the Canadian Advisory Council on the Status of Women (1982)

Joan Wallace, Part-Time Work in Canada: Report of the Commission of Inquiry into Part-Time Work (1983)

Julie White, Women and Part-Time Work (The Canadian Advisory Council on the Status of Women) (1983)

One of the main thrusts of these studies and of the union's submissions was the negative impact of the diminishing full-time employment opportunities for women in the workforce.

Let us assure the union that the Board is aware of these problems and considers them to be high on its agenda when

rethinking its policies in light of the ever-changing reality in the workplaces which fall within federal jurisdiction. It must be appreciated though that most of the remedies for these problems can only be achieved through collective bargaining or through legislative amendments. As far as it can within its limited role in the industrial world which is restricted to interpreting and administering the Code, the Board always does what it can to balance everyone's rights under the Code. Being mindful that the Code is a statute that was born in 1973, the Board has managed even with a statute that old to extend bargaining rights to many groups of employees, particularly in lower management and professional groups, who would have difficulty participating in collective bargaining under some provincial statutes. The Board has also been including part-time employees in bargaining units for many years now. Certainly since long before many of the aforementioned studies into this problem were commissioned.

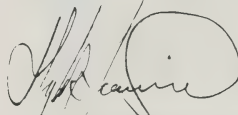
Be that as it may, we can only deal with what we have before us and here; what we have is limited to the CIBC operations at Powell River. This is hardly enough for a landmark decision that would affect the banking industry on a national basis which the union urges us to make. Our decision is therefore limited to the appropriateness of the bargaining unit at the CIBC branch at Powell River.

The evidence before us reveals that the employer has established a regular pool of employees who are called in for casual employment as required. This as required basis includes replacements for sickness, vacations, maternity, and other such leaves of absences. Casuals are also used to supplement regular employees to accommodate extended hours when the bank is open for business. This pool of

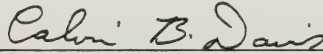
casual employees is hired by the employer on an individual basis. They make applications for employment. They are interviewed, screened and selected according to qualifications and experience. They are then trained to familiarize them with the CIBC forms and computer systems. According to the information before us the bank's complement of employees at Powell River includes twelve (12) full-time employees, seven (7) part-time employees and the casual pool which has averaged six (6) employees over the past three (3) years. It appears that the names of persons in the casual pool have remained remarkably constant except for a few changes. Some of these changes came about when casuals became employed as full or part-time regulars. The hours worked by the casuals are quite substantial. During the three month period preceding the application, some worked as much as two hundred hours. All of this certainly indicates to us a pattern of employment which satisfies the concerns for an ongoing community of interest. In other words, these casual employees have more than a fleeting connection with the employer. Their interest in participating in collective bargaining must therefore be acknowledged and it seems to us that there are many aspects of their employment that could be worthwhile topics for collective bargaining.

Further, the other concerns that the Board has raised in the past such as domination of the unit by casuals are absent here and, the prime consideration of employee wishes is satisfied. The majority of the casual employees affected by this particular application have indicated their desire to be represented by the BCGEU for collective bargaining purposes.

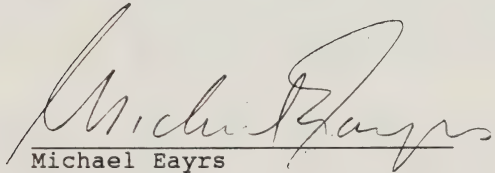
In the foregoing circumstances we find it appropriate to include the casual employees in the bargaining unit. An amended certification order will be issued accordingly.



Hugh P. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 4th day of January, 1991.

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Summary

NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES AND TECHNICIANS, APPLICANT;
AND CFCN TELEVISION, A DIVISION OF
CFCN COMMUNICATIONS LIMITED; AND WHITE
IRON FILM AND VIDEO PRODUCTIONS, A
DIVISION OF CFCN PRODUCTIONS LIMITED,
EMPLOYERS.

Board Files: 560-250
585-390
530-1880

Decision No.: 844

Résumé de Décision

L'ASSOCIATION NATIONALE DES EMPLOYÉS
ET TECHNICIENS EN RADIODIFFUSION,
REQUÉRANTE, AINSI QUE CFCN TELEVISION,
UNE DIVISION DE CFCN COMMUNICATIONS
LIMITED, ET WHITE IRON FILM AND VIDEO
PRODUCTIONS, UNE DIVISION DE CFCN
PRODUCTIONS LIMITED, EMPLOYEURS.

Dossiers du Conseil: 560-250
585-390
530-1880

N° de Décision: 844

These reasons deal with a
constitutional jurisdiction issue of
whether production operations which
have been spun off from a television
station's production department to a
separate production undertaking
remains in federal jurisdiction.

Les motifs qui suivent portent sur une
question de compétence
constitutionnelle: les activités de
production transférées du service de
production d'une station de télévision
à une entreprise de production
distincte relèvent-elles toujours de
la compétence fédérale?

In the circumstances before it in this
case, a majority of the panel found
that the newly created production
undertaking does not fall within the
jurisdiction of this Board. Member
Davis, in his dissenting opinion,
found that the production operation
which was spun off remains in federal
jurisdiction.

Dans les circonstances de l'affaire
devant le Conseil, la majorité a jugé
que la nouvelle entreprise de
production ne relevait pas de la
compétence du Conseil. M. Davis, dans
son opinion dissidente, a conclu que
les activités de production
transférées étaient toujours
assujetties à la compétence fédérale.



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Reasons for decision

National Association of Broadcast
Employees and Technicians,

applicant,

CFCN Television, a division of
CFCN Communications Limited,

and

White Iron Film and Video
Productions, a division of CFCN
Productions Limited,

employers.

Board Files: 560-250
585-390
530-1880

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Daniel J. Rogers, for the applicant; and
Mr. Grant N. Stapon, for the employers.

The reasons for this majority decision were written by Vice-Chair Hugh R. Jamieson. The dissenting opinion of Member Calvin B. Davis is attached.

I

These reasons deal with the issue of whether the Canada Labour Relations Board has the constitutional authority to regulate the labour relations of White Iron Film and Video Productions (White Iron). This question arose in the context of three applications which were filed by the National Association of Broadcast Employees and Technicians (NABET) on September 10, 1990.

NABET is the certified bargaining agent for a unit of employees employed at CFCN Television (CFCN-TV), a division of CFCN Communications Limited (CFCN Communications). The bargaining unit represented by NABET is described in the Board's certification order dated December 31, 1986 as follows:

"all employees of CFCN Television, a division of CFCN Communications Limited working at and from Broadcast House, Calgary, Alberta, excluding president and general manager - TV, vice-president/Mobile, vice-president/Programming, supervising producer, talent (freelance), TV news director, technical producer, sports director, vice-president/TV news and public affairs, traffic manager, commercial production manager, manager, operations, vice-president - sales, manager, retail sales, sales persons, director of engineering, chief engineering - TV, carpenter, receptionist, freelancer (weather)"

The bargaining unit includes employees who work in the production department of CFCN-TV. This is standard bargaining unit construction practice in this industry as production departments are more often than not an integral part of the TV network's broadcasting operations. In July 1990, a corporate decision was implemented by CFCN Communications which resulted in some of the production work performed by the CFCN-TV production department being transferred to White Iron which was a newly created division of CFCN Productions Limited (CFCN Productions) which, in turn, is a wholly-owned subsidiary of CFCN Communications.

To facilitate the start-up of White Iron, CFCN Communications provided the necessary financial backing and some production equipment used by CFCN-TV was rolled over

to White Iron. Some production employees represented by NABET at CFCN-TV were offered and accepted employment at the new undertaking. According to NABET, the work now being performed by these employees at White Iron is the same work as they had done previously at CFCN-TV and, this work is being done for the same clients.

It was this "spin off" of a new business entity and the transfer of bargaining unit work that caused NABET to file its applications with the Board on September 10, 1990. The union primarily took the position that CFCN-TV and White Iron are associated or related companies which ought to be declared to be a common employer for labour relations purposes pursuant to section 35 of the Code (Board file 560-250). In the alternative, NABET alleged that CFCN-TV had sold a part of its business to White Iron within the meaning of section 44 of the Code (Board file 585-390) and, in an application under section 18 of the Code NABET asked the Board to amend its certification order to include the employees at White Iron engaged in production work (Board file 530-1880).

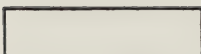
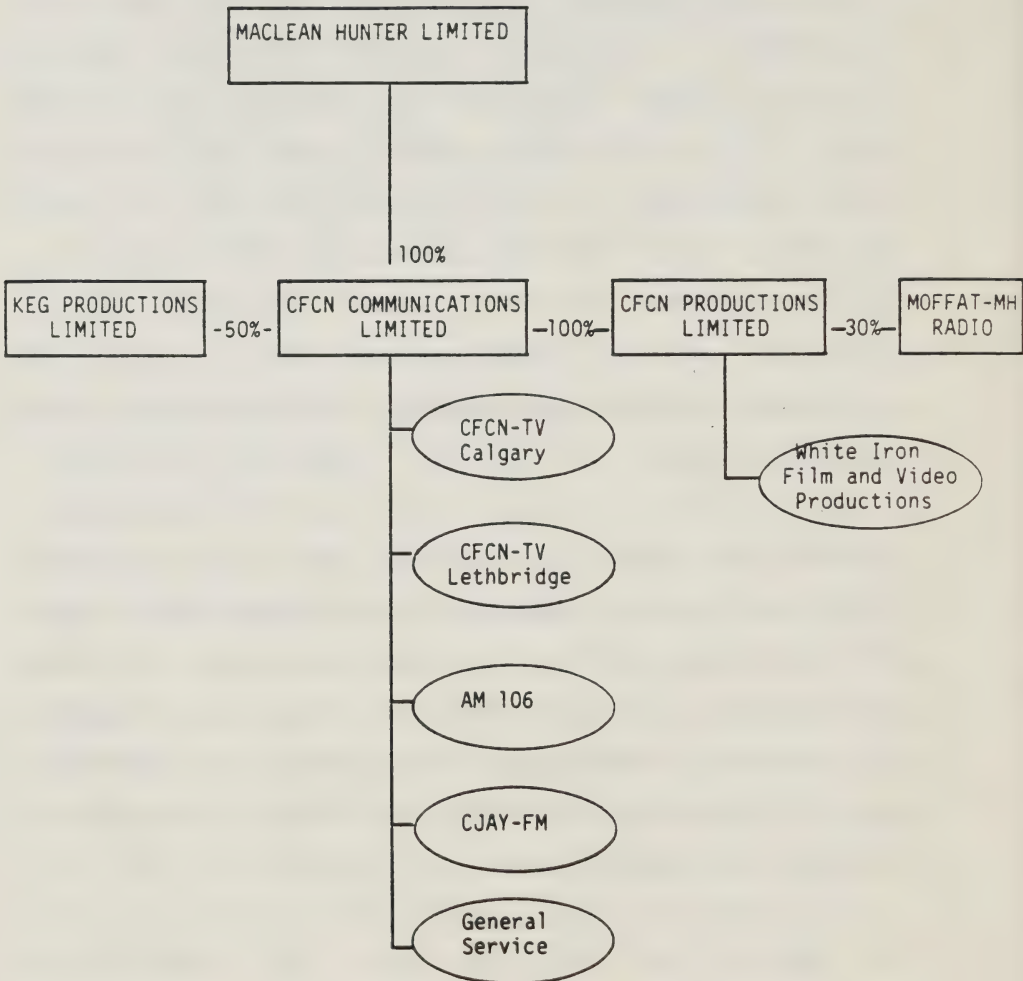
CFCN-TV and White Iron denied that their operations constituted a common employer within the meaning of section 35 of the Code. They also denied that a sale of business had occurred. White Iron submitted that its operations as a production company fall within provincial jurisdiction and it challenged this Board's authority to deal with its labour relations.

A hearing was conducted into this constitutional jurisdiction issue at Calgary on October 31 and November 1, 1990.

II

CFCN Communications is a MacLean Hunter Limited company. While it is well established that corporate relationships are not determinative when assessing constitutional jurisdiction, it is useful to have a clear picture of where these companies to which we are referring fit into the corporate structure:

CORPORATE ORGANIZATIONAL CHART



Limited Company/Partnership



Division

It is also interesting to note that in addition to the above-named companies, the MacLean-Hunter Limited empire contains a multitude of other enterprises which include TV and radio stations, cablevision companies, communications services, printing operations, newspaper and magazine publishing and business forms companies. Some of these companies are federally regulated, others fall within provincial jurisdiction. Many are unionized and they conduct their labour relations business in the appropriate provincial or federal forum. We point this out only to highlight that we are not dealing here with a single employer enterprise where divided jurisdiction would cause administrative hardship. It is commonplace for MacLean-Hunter Limited companies to operate in either jurisdiction.

Furthermore, there is no suggestion here that the decision to spin off some of the production work from CFCN-TV was in any way motivated by a desire to escape from collective bargaining obligations to NABET. There are no allegations of anti-union animus.

There can be no doubt that CFCN-TV is a federal undertaking. Its operations are clearly broadcasting and as such are federally regulated. This obviously includes the production department that still exists at CFCN-TV. The only work that was transferred to White Iron was the non-on-air CFCN-TV client work. CFCN-TV did maintain its own production department which is capable of producing everything necessary for CFCN-TV to meet its licensing obligations to the CRTC. No one in these proceedings took issue with the fact that the CFCN-TV production department is still an integral part of CFCN-TV's broadcasting operations. As such it is a non-severable division of CFCN-TV's undertaking and

the employees who work there are undoubtedly employed upon or in connection with a federal work, undertaking or business as contemplated by section 4 of the Code.

It is also clear that White Iron's business is not broadcasting or radio communications, it is production work that is in itself provincial in nature. The only way White Iron can be brought into federal jurisdiction is if it can be found to be vital, essential or integral to the operations of CFCN-TV which would be the core federal undertaking for the purposes of what has become known as the Northern Telecom tests which take their name from the well known decisions of the Supreme Court of Canada in Northern Telecom Limited v. Communications Workers of Canada (1979), 79 CLLC 14,211; 28 N.R. 107; 98 C.L.R. (3d) 1; and [1980] 1 S.C.R. 115; and Northern Telecom Limited v. Communications Workers of Canada, (1983) CLLC 14,048; 147 D.L.R. (3d) 2; and 48 N.R. 161. In the first decision, Mr. Justice Dickson summarized the principles to be followed when determining whether an undertaking or business is federal. (These guidelines were first enunciated in Construction Montcalm Inc. v. The Minimum Wage Commission, [1979] 1 S.C.R. 754; 93 D.L.R. (3d) 641; and 25 N.R. 1).

"(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

A recent decision of the British Columbia Labour Relations Board, Arrow Transfer Co. Ltd., [1974] 1 Can LRBR 29, provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as 'vital', 'essential' or 'integral'. As the Chairman of the Board phrased it, at pp. 34-35:

'In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.'

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the 'normal or habitual activities' of that department as 'a going concern', and the practical and functional relationship of those activities to the core federal undertaking."

(Northern Telecom Limited v. Communications Workers of Canada, [1980] 1 S.C.R. 115, at pages 132-133; emphasis added)

The test is obviously a subjective one with each case turning on its particular facts. What must be kept in mind though is that it is the nature of the operation and undertaking as a going concern that must be taken into consideration and not just the particular work being done by the employees in question. This was re-confirmed recently by the Supreme Court of Canada in Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications [1989] 2 S.C.R. 225 at pages 257-258:

"There is ample authority for the proposition that the crucial issue in any particular case is the nature or character of the undertaking that is in fact being carried on."

In that same case, the Supreme Court of Canada also re-affirmed that corporate arrangements are not determinative:

"Underlying many of the arguments is an unjustified assumption that by choosing a particular corporate form the various players can control the determination of the constitutional issue. This Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved."

(Alberta Government Telephones, supra at pages 263-264; emphasis added)

One of the key issues we have to determine here is whether White Iron is merely the continuation of the CFCN-TV production department dressed in a different commercial costume, or if it is really the new and separate undertaking with an independent purpose that the employers claim. (For an insight into what components the Supreme Court of Canada

considers necessary to constitute an undertaking, see U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048).

In this regard, keeping in mind that CFCN-TV still satisfies its production needs through its own production department which it retained, it is our opinion that White Iron is a separate undertaking with its own purpose quite independently from CFCN-TV. Its activity is intended to be independent from CFCN-TV. White Iron was not intended to benefit from CFCN-TV and does not benefit from the core undertaking. CFCN-TV is not even a client of White Iron. The purpose and objectives of White Iron are to become a separate stand-alone production enterprise which will compete in the lucrative production marketplace doing work for clients which may or may not be TV stations. The "raison d'être" for the creation of White Iron is to compete in this market which has expanded greatly over the past decade or so in keeping with the advancement of video technology and the ever-growing demand for video programs for other than television broadcasting purposes. Many other businesses, educational facilities, health care establishments, government departments, and many other agencies are using video-taped programs on an ever-increasing scale. It is this market that White Iron was created to compete in.

Furthermore, White Iron does have all the components necessary to be considered an undertaking in its own right. Notwithstanding that in these early days of its existence White Iron does share some facilities and administrative services with CFCN-TV, it does have its own objectives, separate management, its own equipment and workforce, its own logo, telephone system, bank account, billing and pay systems. It also operates from a separate location.

Incidentally, CFCN Productions is billed by CFCN Communications for any costs incurred by White Iron using CFCN-TV's facilities. Based on all of the foregoing, we are satisfied that White Iron is an undertaking separate and apart from CFCN-TV.

NABET argued that White Iron is still an integral part of CFCN-TV's broadcasting undertaking and it supported this contention by pointing out several remaining links between CFCN-TV and White Iron. These connections included financial backing (actually from CFCN Communications); sharing of some equipment such as cameras and on occasions camera operators; the use of CFCN-TV's editing facilities and the sharing of studio time; sales employees of both CFCN-TV and White Iron work in conjunction soliciting the same clients for the sale of air time and production. NABET also directed our attention to where at least one TV show produced by CFCN-TV requires the services of a White Iron employee to produce and direct the show. In its argument NABET relied heavily on the Board's decision in Shamrock Television System Inc., CKOS-TV and CICC-TV (1987), 70 D.L.R. 168; and 17 CLRB (NS) 205 (CLRB no. 639) where an apparently segregated production division was found to be an integral and an indivisible part of a broadcasting undertaking. The union claimed that the circumstances in that case were comparable to the circumstances before us here. With respect, this does not appear to be so, particularly in light of the presence of a separate undertaking in this case. The whole thrust of the Shamrock decision is that there was no distinguishable production undertaking.

CFCN-TV and White Iron on the other hand relied mainly on the decision of the Supreme Court of Canada in Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al. (1983), 146 D.L.R. (3d) 202; and 83 CLLC 14,033, which counsel for the employers submitted settles the issue of whether commercial production is vital, essential or integral to a broadcasting company when there are two separate undertakings involved. There, the Court said:

"... A television broadcasting undertaking may well sell no sponsored air time and produce no programs, yet remain a television broadcasting undertaking. Conversely, an undertaking may sell sponsored air time for another or produce programs which it sells to another undertaking without thereby becoming a television broadcasting undertaking.

It may be asked whether these activities would fall within the field of television broadcasting if they had been undertaken by companies completely unrelated to the parent company. I think the answer to this question is clearly no. Selling sponsored air time and producing programs and commercial messages does not make the seller or producer a television broadcaster. Furthermore, these activities are not indispensable to the Télé-Métropole Inc. operation.

The Attorney General of Quebec wrote, correctly in my view:

[TRANSLATION] In the case at bar we do not contend that no relationship existed between the activities of Télé-Métropole Inc. and those of Paul L'Anglais and J.P.L. Productions Inc., or that the fact that a television broadcasting station has its air time sales company or production company does not constitute a benefit to its operations. We are simply saying that these links with a television broadcasting undertaking do not have the effect of making the undertaking which produces the programs and the undertaking which sells air time component parts of the television broadcasting in all respects. We argue that Paul L'Anglais Inc. and J.P.L. Productions Inc. are not engaged in television broadcasting, but rather in the sale in the one case, and production in the other, of television programming."

(pages 218-219, and 12,152)

With respect, it seems to us that the above quote from Paul L'Anglais, supra only stands for the principle that commercial production on its own is provincial. It does not eliminate the possibility that in some circumstances an independent production company can be integral to a broadcasting operation. This is not an issue at law, it depends entirely upon the facts of each case.

We do, however, agree with counsel for CFCN-TV and White Iron that the constitutional facts before us here fail to show a sufficient degree of integration between the two operations to support a finding that White Iron is an integral part of CFCN-TV's core federal undertaking. CFCN-TV does not depend in any way on White Iron's services and it would not be disadvantaged vis-à-vis its broadcasting capability if White Iron ceased its operations.

In Burns International Security Services Limited et al. (1989), 3 CLRBR (2d) 264 (CLRB no. 746), the Board emphasized the need to look at the general nature of a subsidiary operation as a going concern and to assess the importance and relationship of the work done by the employees in question to the primary core federal functions and, most importantly, the physical and operational connection between the two operations. Finding that building security services when done by an outside contractor were not vital, essential, or integral to the core federal functions of Canada Post Corporation which are to collect, distribute and deliver mail, the Board said:

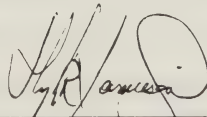
"Once again, a clear illustration that the operations of an outside contractor must be a vital and essential integrated part

of the core federal functions before the
primary provincial competence presumption
can be ousted."

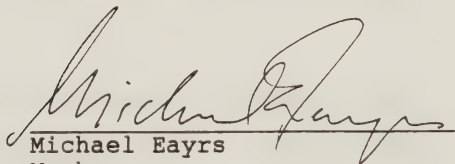
(page 270; emphasis added)

Here, in our respectful opinion, the necessary degree of operational and functional integration is not present. Nothing flows from White Iron to CFCN-TV of an operational or functional nature. White Iron provides no services to CFCN-TV. Some productions of White Iron may be aired on television by CFCN-TV or by other television networks but this does not make White Iron federal. Many businesses manufacture things that are crucial to the operation of federal undertakings such as aircraft, ships or trucks and their operations remain in provincial jurisdiction. Certainly, there is here a degree of dependency by White Iron upon the financial support of CFCN Communications and the sharing of facilities with CFCN-TV for the time being while White Iron's business operations get off the ground. Dependence upon a core federal undertaking does not, however, convert a provincial operation into a federal one. It is our finding that the operations of White Iron do not fall within the jurisdiction of this Board.

The applications filed by NABET on September 10, 1990 are dismissed accordingly.



Hugh R. Jamieson
Vice-Chair



Michael Eayrs
Member

Dissenting opinion of Member Calvin B. Davis

I have read the decision of my colleagues and I concur with all that has been said about the law and the tests which are to be applied when determining whether an undertaking is provincial or federal. Where I part company with the majority is in the assessment of constitutional facts. Unlike my colleagues I cannot find that White Iron is a separate undertaking. It is my view that White Iron still is an integral and indivisible part of CFCN TV's broadcasting and production enterprise.

Undoubtedly CFCN Communications intended to create an independent production entity but, in my opinion, they have not yet achieved this objective. Much of what was said about White Iron was hypothetical. There were many projections into what White Iron is intended to become and what its future holds. However, we must deal with the reality of today, not the future, and when the existing facts are analyzed little has changed except that a group of CFCN-TV production employees are operating under a different corporate label. They use the same equipment and do the same work they used to do for the same clients. They share the same CFCN-TV editing and studio facilities because White Iron does not as yet have its own. The evidence also revealed that the practice of CFCN Communications charging other divisions or departments for services rendered is not new. The fact that White Iron is billed for the use of CFCN-TV facilities is not determinative in my opinion.

Looking at the prevailing circumstances I must agree with NABET about the similarity of the facts of this case and those in the Shamrock Television System Inc., supra,

decision. In that case, the fact that a production unit was located at different premises, was identified by a different logo, had its own invoices and billing systems and had a separate bank account was not considered to be determinative. I adopt that approach here and I find that White Iron is in fact an integral and indivisible part of CFCN-TV's operations and as such it remains in federal jurisdiction.

Calvin B. Davis
Calvin B. Davis
Member

DATED at Ottawa this 10th day of January, 1991.

CLRB / CCRT - 844

information

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SUMMARY

CANADIAN NATIONAL RAILWAY COMPANY, APPLICANT, AND NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION, RESPONDENT UNIONS, VARIOUS INTERVENORS AND INTERESTED PARTIES.

Board Files: 530-1850
530-1851

Decision No.: 845

RÉSUMÉ

LA COMPAGNIE DES CHEMINS DE FER NATIONAUX DU CANADA, REQUÉRANTE, LE SYNDICAT NATIONAL DES TRAVAILLEURS ET TRAVAILLEUSES DE L'AUTOMOBILE, DE L'AÉROSPATIALE ET DE L'OUTILLAGE AGRICOLE DU CANADA (TCA - CANADA); LA FRATERNITÉ INTERNATIONALE DES OUVRIERS EN ÉLECTRICITÉ; L'ASSOCIATION INTERNATIONALE DES MACHINISTES ET DES TRAVAILLEURS DE L'AÉROSPATIALE; L'ASSOCIATION UNIE DES COMPAGNONS ET APPRENTIS DE L'INDUSTRIE DE LA PLOMBERIE ET DE LA TUYAUTERIE DES ÉTATS-UNIS ET DU CANADA; LA FRATERNITÉ INTERNATIONALE DES CHAUDRONNIERS, CONSTRUCTEURS DE NAVIRES EN FER, FORGERONS, FORGEURS ET AIDES; L'ASSOCIATION INTERNATIONALE DES TRAVAILLEURS DU MÉTAL EN FEUILLES; LA FRATERNITÉ DES INGÉNIEURS DE LOCOMOTIVES ET LES TRAVAILLEURS UNIS DES TRANSPORTS, SYNDICATS INTIMÉS, DIVERS INTERVENANTS ET PARTIES INTÉRESSÉES.

Dossiers du Conseil : 530-1850
530-1851

Décision n° : 845

This interlocutory decision deals with a number of preliminary objections raised by the respondent trade unions with respect to two section 18 applications by the employer, Canadian National Railways, (CNR), in which it sought review of bargaining units. In one application CNR requested consolidation of the bargaining units representing its "running trades" employees from two units into one. In the second application it requested consolidation of the bargaining units representing its "shopcraft" employees from six bargaining units into one. The Board, with the consent of the parties, heard together the preliminary objections filed with respect to both applications.

The Board heard the preliminary objections in three groups. The first group consisted of objections going to the Board's jurisdiction to hear the applications at all. These objections challenged the propriety of CNR's applications on the basis that they sought to affect representation rights and if successful would be a violation of the right of freedom of association. The Board dismissed these objections and reiterated principles expressed in previous decisions in which it recognized the legitimate interest of an employer in the

La décision interlocutoire qui suit traite d'un certain nombre d'objections préliminaires soulevées par les syndicats intimés à l'égard de deux demandes présentées par l'employeur, la Compagnie des chemins de fer nationaux du Canada (CN), en vertu de l'article 18, en vue d'obtenir la révision d'unités de négociation. Dans une demande, l'employeur tente d'obtenir la fusion des deux unités qui représentent les employés itinérants en une seule unité. Dans la deuxième demande, il tente d'obtenir la fusion des six unités qui représentent les employés de métiers d'ateliers en une seule unité. Le Conseil, avec l'assentiment des parties, a entendu de concert les objections préliminaires formulées à l'égard des deux demandes.

Le Conseil a entendu les objections préliminaires en trois volets. Le premier porte sur des objections concernant la compétence du Conseil pour instruire les demandes. Ces objections mettent en doute la pertinence des demandes de CN compte tenu du fait que ces demandes visent les droits de représentation et que, si elles sont agréées, elles porteraient atteinte à la liberté d'association. Le Conseil a rejeté ces objections et a réitéré des principes élaborés dans des décisions antérieures selon lesquels le Conseil reconnaissait l'intérêt légitime d'un

determination of what is an appropriate unit for collective bargaining. The Board's procedures are in the interest of collective bargaining and good labour relations and there can be no question in cases before the Board of depriving employees of their right to representation. An individual employee's right of membership in a trade union is recognized by the Code and is untouched by the applications. This right is different from a trade union's right to bargain on behalf of employees in a defined unit. The Board is empowered by section 18 to review more than one order in the course of a review application.

The second group of objections concerned the timeliness of the shopcrafts application. It was argued that the application was premature in that insufficient time had passed since a recent determination by the Board of an appropriate unit and no "prima facie" case had been shown for the section 18 application. The Board dismissed these objections and noted that the previous review, in 1986, considered the viability of the Canadian Council of Railway Shopcraft Employees and Allied Workers as the exclusive bargaining agent for the members of its constituent unions. The Board was not then asked to address the question of the continuing validity of organization on craft lines as it is in the present applications. The employer was not seeking to present a case it should have presented in 1986. Its position was not contrary to the "clean hands" doctrine. The Board acknowledged that negative labour relations consequences would flow from undertaking the review but stated that negative labour relations consequences would also flow from not undertaking the review.

The third group of objections challenged the "prima facie" sufficiency of the applications as well as the sufficiency of the particulars provided by CNR in response to an earlier ruling by the Board with respect to the applications. The Board ruled that the applications contained allegations which it considered should be heard and which, if established, might lead the Board to redefine the unit or units appropriate for collective bargaining. The Board ruled that the particulars supplied by CNR satisfied the requirements imposed by the Board in its previous ruling.

The Board advised the parties that proceedings of this nature could be instituted by the Board itself and that it may require the parties to produce such evidence as it determines to be necessary. The Board is not bound, in this respect, by the parties "pleadings".

employeur dans la détermination d'unités habiles à négocier collectivement. Les procédures du Conseil sont conformes à l'intérêt de la négociation collective et des bonnes relations de travail. Dans les affaires devant le Conseil, il ne peut être question de priver les employés de leur droit à la représentation. Le Code reconnaît le droit d'adhésion à un syndicat des employés, et ce droit n'est pas visé par les demandes. Ce droit est bien différent du droit d'un syndicat de négocier au nom des employés membres d'une certaine unité. En vertu de l'article 18, le Conseil peut réviser plus d'une ordonnance dans le cadre d'une demande de révision.

Le deuxième groupe d'objections porte sur l'admissibilité de la demande visant les unités de métiers d'ateliers. On prétend que la demande est prématurée: il n'y a pas eu suffisamment de temps depuis que le Conseil a déterminé tout récemment une unité habile à négocier et aucune preuve suffisante n'a été fournie à l'égard de la demande présentée en vertu de l'article 18. Le Conseil a rejeté ces objections et a constaté que la révision de 1986 portait sur la viabilité du Conseil canadien des employés de métiers d'ateliers ferroviaires et des travailleurs associés à titre d'agent négociateur exclusif des membres des syndicats membres. On n'avait pas alors demandé au Conseil d'aborder la question de la validité continue de l'organisation en fonction des métiers comme c'est le cas dans les présentes demandes. L'employeur ne tentait pas de présenter des arguments qu'il aurait dû présenter en 1986. Sa position n'est pas contraire à la doctrine des «mains propres». Le Conseil a reconnu qu'entreprendre une révision entraînerait des conséquences néfastes liées aux relations de travail, mais il a ajouté que ne pas entreprendre une révision entraînerait également de telles conséquences.

Le troisième groupe d'objections contestait la pertinence des demandes ainsi que la suffisance des détails fournis par CN en réponse à une décision antérieure du Conseil concernant les demandes. Le Conseil a décidé que les demandes contenaient des allégations qui, à son avis, devaient être entendues et qui, si elles étaient établies, pouvaient amener le Conseil à redéfinir l'unité ou les unités habiles à négocier collectivement. Le Conseil a jugé que les détails fournis par CN satisfaisaient aux exigences imposées dans sa décision antérieure.

Le Conseil a informé les parties qu'il pouvait de son propre gré engager des procédures de ce genre et qu'il pouvait obliger les parties à produire les éléments de preuve qu'il juge nécessaires. Le Conseil n'est pas lié, à cet égard, par les «plaidoiries» des parties.

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Reasons for decision

Canadian National Railway
Company,

applicant,

and

National Automobile, Aerospace
and Agricultural Implement
Workers Union of Canada (CAW -
Canada); International
Brotherhood of Electrical
Workers; International
Association of Machinists and
Aerospace Workers; United
Association of Journeymen and
Apprentices of the Plumbing and
Pipe Fitting Industry of the
United States and Canada; the
International Brotherhood of
Boilermakers, Iron Ship
Builders, Blacksmiths, Forgers
and Helpers, Sheet Metal Workers
International Association;
Brotherhood of Locomotive
Engineers and United
Transportation Union,

*respondent unions, various
intervenors and interested
parties.*

Board files: 530-1850
530-1851

The Board was composed of Mr. J.F.W. Weatherill,
Chairman, and Ms. Evelyn Bourassa and Mr. Robert Cadieux,
Members.

Hearings in this matter were held at Montréal on November
27, 28, 29 and 30, and at Ottawa on December 17, 1990.

Appearances:

Messrs. John Coleman and Alphonse Giard, Q.C., for
Canadian National Railway Company;

Mr. Harold Caley, for the United Transportation Union;

Mr. James L. Shields, for the Brotherhood of Locomotive
Engineers and the International Association of
Machinists;

Mr. Steve Waller, for the Canadian Automobile Workers;

Mr. François Coté, for the International Brotherhood of Electrical Workers;

Messrs. Michael Church and Abe Rosner, for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, the Sheet Metal Workers International Association and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

INTERLOCUTORY DECISIONS

For the purpose of hearing certain preliminary objections raised with respect to the applications made in files 530-1850 and 530-1851, these matters were, at the suggestion of the Board and with the consent of the parties, heard together. In the event they proceed to hearing on the merits, these applications will then be heard separately, except with respect to one company witness whose evidence, the parties have agreed, will be common to both cases.

In the application in file 530-1850 Canadian National seeks review of the bargaining units made up of its "running trades" employees. In file 530-1851 it seeks review of the units comprised of its "shopcraft" employees. In each case the employer requests the consolidation of what are now respectively two and six bargaining units into one. When we refer to "two" and "six" bargaining units we refer to the de facto situation: there are respectively two and six bargaining agents representing, in fact, groups of employees in bargaining units which may be said to have been created by virtue of certificates issued by this Board or its

predecessor. In this regard, and in the case particularly of the shopcraft units, the historical "cobwebs" which were once to be found have been cleared away by or since the Board decision in Canadian National Railway Company et al. (1986), 64 di 70 (CLRB no. 556), which involved these parties, as well as others.

Each of the respondent trade unions, being the bargaining agent for the employees in one or another of the bargaining units in question, has raised one or more preliminary objections to the Board's proceeding to deal with these applications on their merits. In some respects the positions of the various respondents are similar, and in other respects they differ.

The Board heard these objections in three groups, the first consisting of objections going to the Board's jurisdiction to hear these matters at all, the second - referred to in a very rough way as the "timeliness" objections - going to the exercise of any discretion the Board might have to hear these matters on their merits at this time and the third going to the "prima facie" sufficiency of the applications. There was also raised the matter of the sufficiency of the particulars provided by the applicant pursuant to the Board's earlier ruling in these matters on November 15, 1990. The first set of objections, which related to both applications, was presented initially by Mr. Caley, counsel for the United Transportation Union, one of the "running trades" unions. The second set of objections, which related primarily to the "shopcraft" application, was presented primarily by Mr. Church, counsel for the Boilermakers, the Sheet Metal Workers and the Plumbers and Pipe Fitters. The third set

of objections was presented by Mr. Shields, counsel for the Brotherhood of Locomotive Engineers and for the International Association of Machinists, and related to both applications. All parties were given a full opportunity to be heard on all sets of objections.

I

The "jurisdictional" objections were based on arguments in support of two principal theses: (1) that the applications sought to affect representation rights, and that this was an improper use of section 18 of the Code, which it was not open to an employer to invoke for this purpose; and (2) that the applications, if successful, would lead to a violation of the right of freedom of association enshrined in the Code and in ILO Convention No. 87, which has been ratified by Canada.

Section 18 of the Canada Labour Code (Part I - Industrial Relations) is as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

This constitutes a broad discretionary power of review which the Board has exercised both with respect to the merits of recent adjudicative decisions (subject to policies the Board has developed regarding timeliness), and with respect to the continued appropriateness of established bargaining units.

There can be no doubt that an application of this sort implies certain potential effects on representation rights: if two or more bargaining units are to be reduced

to one there will, in the end, be one bargaining agent where formerly there were more than one, and some employees may not be represented by the bargaining agent of their personal choice. It is conceivable, although it is conceded that such is not this case, that an application of this sort might be evidence of an unfair labour practice, were the application motivated by anti-union animus. Indeed, the application in file no. 530-1850 (now subject to an application for judicial review before the Federal Court of Appeal) was the occasion of a complaint of unfair labour practice, which complaint was dismissed by another panel of the Board (Gary Lloyd Ager, (1990), as yet unreported CLRB decision no. 823).

Although counsel for the unions in the instant cases do not allege that the employer is guilty of an unfair labour practice in filing these applications, it is argued, as noted above, that the applications constitute interference with union representation, and that the employer seeks in each case to force the employees to choose between one union and another. While these arguments, on the surface, may not be without a certain attraction, we believe they are fallacious.

The matter of what constitutes a unit of employees appropriate for collective bargaining is one of the essential matters with which this Board must be concerned, and it is one in which the Board acts more as a policy-maker than as an adjudicator. The Board has recognized in several decisions including Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; 88 CLLC 16,005 (CLRB no. 822) Canada Post Corporation (1988), 73 di 66; 19 CLRBR (NS) 129; (CLRB

no. 675), Marine Atlantic Inc. (1990), as yet unreported CLRB decision no. 822 and most recently in Ager, supra, that an employer has a legitimate interest in the determination of a unit of employees appropriate for collective bargaining, and of course employer views on that issue are considered in every application for certification. Such views may, to the extent they may be accepted by the Board, ultimately have an effect on representation rights, but such effect is simply a necessary incident of the Board's determination of what is an appropriate unit for collective bargaining.

Further, where more than one potential bargaining agent seeks to represent a unit of employees, it may well be that having regard to the evidence of membership before it, the Board will order a representation vote affecting two or more candidate trade unions. Employees are then "forced" - if they wish to vote - to choose between trade unions. It is, of course, the Board, and not the employer, which orders the vote and which thus might be said to "force" the employees. There is nothing untoward in that. In the instant case, of course, the whole procedure has been initiated by the employer. That, however, is of no particular significance: it would be open to the Board itself, on its own motion, to set in progress the review procedure contemplated by section 18 of the Code.

Accordingly, we do not consider that it can properly be said that in making this application the employer seeks to interfere with bargaining rights and to force employees to make a choice they may not wish to make. Rather, the employer seeks to advance what it hopes to

persuade the Board are the interests of good collective bargaining by demonstrating, if it can, that the present bargaining units are not appropriate for that purpose, which is the ultimate purpose embodied in the Code.

It was argued that applications under section 18 are "in the nature of certification applications", and that since certification applications may only be brought by trade unions the present applications, brought by an employer, are improper. Again, with respect, the argument is fallacious. It is true that the Board has, in a number of instances, referred to certain applications under section 18 as being in the nature of applications for certification, and that in those cases it has applied the criteria appropriate to such applications. It is also true, of course, that it is not open to an employer to bring an application for certification. Where the Board has said that in some circumstances a section 18 review is in the nature of a certification application it has done so where that was, in effect, the fundamental purpose of the application - and in many of those cases the applications were brought by trade unions seeking to alter, amend or expand their own bargaining rights. The characterization of such applications as "equivalent to certification" was perfectly appropriate in those cases. It is not as clearly so in the instant cases, although the same essential questions - appropriateness of bargaining units and, prior to any new certifications, membership strength - will arise in this case as would arise in a certification case. The usual criteria in that respect would be applied.

It was further argued that the applications are improper since they seek, inter alia, the revocation of certain bargaining rights, and since the Code does not contemplate applications for revocation brought by an employer (save in cases of fraud, which is not alleged here). In our view, however, the broad power of review conferred by article 18 does indeed permit the Board, subject to the requirements for new certifications being met, to issue new certificates in respect of amended bargaining units, and to revoke existing certificates as a necessary incident of that procedure. It should perhaps be emphasized that there is no question, in the cases before us, of depriving employees of their right to collective representation. The Board's procedures are in the interest of collective bargaining and good labour relations.

Finally, it was argued that section 18, in allowing the Board to review "any order or decision", does not contemplate applications to review more than one order or decision. In our view, the very general language of section 18 does indeed empower the Board to review more than one order in the course of a review application. In this respect we note that in the French version, section 18 uses the plural in providing that the Board "peut réexaminer, annuler ou modifier ses décisions ou ordonnances". Reference may also be made to section 19, by which the Board may issue decisions "either generally or in any particular case or class of cases".

These are, we conclude, applications coming within the broad contemplation of section 18 of the Code, and ones which it is not necessarily improper of the employer to make.

We turn now to a consideration of the objection that the applications, if successful, would lead to violations of the freedom of association. In this respect, reference was made to section 8 of the Canada Labour Code, and to ILO Convention No. 87.

Section 8 of the Code is as follows:

"8. (1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

(2) Every employer is free to join the employers' organization of his choice and to participate in its lawful activities."

The instant applications carry no implications whatever with respect to employees' rights to join the trade union of their choice. What will be affected, if the applications succeed (or, quite apart from the "success" of the applications, if the Board determines, as it would be empowered to do in any event, that the bargaining units should be revised), are the bargaining rights presently enjoyed by the respondent trade unions in their capacity as bargaining agents. An individual employee's right of membership in a trade union is one thing, and is untouched by the present applications. A trade union's right to be a bargaining agent for employees in a defined unit is another thing entirely; it is not a "fundamental freedom", but is a right conferred by this Board or recognized by an employer, as contemplated by the Code. The statement made in Inuvik Housing Authority

1. (1987), 69 di 212 (CLRB no. 627), at page 215 to the effect that section 110(1) (now section 8(1)) of the Code grants "the right of any employee to join the union of his choice and consequently be represented by it" should not be taken out of context and read as though the Board were saying that any individual employee had the "right" to be "represented by the union of his choice". The Code, which recognizes individual rights of freedom of association, also recognizes, and establishes methods of effecting rights of collective representation for the purposes of collective bargaining.

The definition of the bargaining unit for which a trade union may become the bargaining agent is a matter for this Board, and while we believe that the reasonable expectations of the parties with respect to the stability of bargaining units should be supported (a matter to which we shall return in dealing with the "timeliness" objections), we think it should be remembered that a bargaining unit is not a piece of enduring property which any one of the parties to collective bargaining could properly think of as "theirs" in any permanent sense.

The freedoms established by article 8 of the Code are essentially those dealt with in ILO Convention No. 87. Reference may be made to the following articles of the Convention:

"Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization.

Article 3

1. Workers' and employers' organizations shall have the right to draw up their constitutions

and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

...

Article 11

Each Member of the International Labour Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."

It should be clear, for the reasons given above, that neither workers' freedom of association nor the exercise of their right to organize is put in jeopardy by the instant applications. Similar issues were discussed by the Board at some length in Sedpex Inc. et al. (1985), 63 di 102 (CLRB no. 543). The Board referred to Canadian Pacific Limited (1984), 57 di 112; 8 CLRBR (NS) 378; and 84 CLLC 16,060 (CLRB no. 482), where:

"... because of corporate re-organization the Board found it appropriate to merge two bargaining units which were represented by separate trade unions. The minority group of 80 who were merged with a unit of some 600 took the position that the Board's failure to order a vote infringed upon their freedom of association under the Charter. Expressing the view that the system of collective bargaining which contemplates the inclusion of employees in bargaining units which are determined to be appropriate by labour relations boards and the granting of representation rights on the basis of a majority rule does not give rise to freedom of association issues because employees are still free to join or not to join a trade union, the Board concluded, '... Once a majority rule system is accepted as valid under the Charter, it is inevitable that certain employees will not be represented by the bargaining agent of their choice ...' (pages 130; 396; and 14,502) ..."

In the instant cases, while counsel have (quite properly, in our view) refrained from advancing any Charter argument, it will be clear that what the Board has said in Canadian Pacific and Sedpex, supra, applies equally in the present circumstances. The right to organize for the purpose of collective bargaining on the basis of a majority rule in respect of an independently-determined constituency or bargaining unit is complementary to the right of freedom of association. Determining bargaining units appropriate for collective bargaining is a vital aspect of the establishment of a trade union's "right" to be the exclusive bargaining agent of the members of the bargaining unit. The bargaining unit is determined not merely for the purpose of establishing those bargaining rights but also with a view to eventual collective bargaining and collective agreement administration. For that reason, a number of interests, including those of the employer, are entitled to be considered in determining bargaining units, as the Board has pointed out in its previous decisions in Cape Breton Development Corporation, supra, Canada Post Corporation, supra, Maritime Atlantic Inc., supra, and Ager, supra.

For the foregoing reasons, it is our conclusion that the applications before us do not constitute and do not contemplate any violations of the freedom of association.

What we have called the "jurisdictional" objections are accordingly dismissed. We turn now to the "timeliness" objections.

II

These arguments relate to the shopcraft application. Their thrust is that the application, like that made by the Letter Carriers Union of Canada recently in Canada Post Corporation (1990), as yet unreported CLRB decision no. 818, is premature, in that insufficient time has gone by following the Board's recent determination of an appropriate unit. Mr. Church put forward six principal heads of argument: (1) that no "prima facie" case had been shown for having recourse to section 18 of the Code; (2) that it was too soon after the Board's last consideration of these units, and that no catastrophic event had occurred which might justify review now; (3) that the employer did not come to the Board with clean hands; (4) that the Board's role in establishing the present bargaining units was such that it would be unseemly now to revise them; (5) that the conduct of the unions represented by Mr. Church has been such that it would be unfair to require them, in effect, to defend the bargaining rights they now hold; and (6) that the applications themselves have adverse labour relations consequences, and should not be proceeded with.

The first of these arguments, that relating to whether or not a "prima facie case" appears, was also elaborated by Mr. Shields, and we will deal with it in the next section of these reasons. The second argument contains what might appear to be the most powerful objection to the Board's continuing with these proceedings, namely that it was only a relatively short while ago that the present bargaining units were established. The current certificates were, for the most part, issued pursuant to

the Board's decision in Canadian National Railway Company et al., supra. In that case the Board dealt with a number of applications relating to the representation of shopcraft employees of three major railways, including Canadian National. In the result, the Board revoked the certification of the Canadian Council of Railway Shopcraft Employees and Allied Workers which had been granted some years previously and issued new certificates to the several shopcraft unions. The decision followed investigations and hearings which had gone on for several years. Since that time the individual craft unions have held bargaining rights for the several units of employees involved, although it appears that bargaining has in fact been carried on through a council of unions.

It would be easy to say that in this case, as in Canada Post Corporation, supra, the new arrangements should be given time to work. In the Canada Post Corporation situation the Board had, only two years before, certified one bargaining agent in the place of several. Negotiations for a first agreement were under way at the time of the application. In its recent decision, the Board reiterated its finding that a combined unit of inside workers and letter carriers was appropriate, and indicated that it would take "a few collective agreements" before the value of the units determined in 1988 could be appreciated.

In the instant case the circumstances are very different. What the Board did with respect to these parties in 1986 (CLRB decision no. 556), did not involve a reconsideration of the entire bargaining unit structure affecting work in the railway shops. Rather, the Board

considered the viability of the Canadian Council of Railway Shopcraft Employees and Allied Workers as the exclusive bargaining agent for the members of its constituent unions. These constituent unions had continued, during the period when the Council was certified bargaining agent, to represent their own members in the employ of the railway in respect of matters coming within their jurisdiction. Certification of the Council had never had the same real implications for individual trade unions that the certification of the Canadian Union of Postal Workers had in Canada Post Corporation, and the revocation of the Council's certification in 1986 was really a recognition that the status quo ante was a continuing reality. Since the original organization of railway workers close to a century ago, that organization has been on craft lines. The 1986 decision, while it cleared away some of the "cobwebs", did not address, and the Board was not then asked to address, the question of the continuing validity of organization on craft lines. The present applications do raise that issue.

In the recent application for certification in Canada Post Corporation, supra, the Board dismissed the application without hearing evidence in support of the applicant's allegations, which course we are asked to follow in the instant case. The issue is stated as follows:

"After deliberation, the Board decided that, before allowing the parties to engage in a lengthy and possibly pointless exercise, it was appropriate to address the issue of the appropriateness for collective bargaining of the unit sought, in the context of the applicant's allegations. If the Board were to hold those allegations well founded, would it

alter the existing unit in the direction requested?"

(Page 7)

In that case, for the reasons given, the Board answered that it would not alter the existing unit. As we have noted, the circumstances in which that application was brought were very different from those of the instant case. Here, a basic question going to the fundamental basis of definition of bargaining units is raised and, notwithstanding the many occasions on which the railway bargaining units have been considered by this Board, it is raised in a serious and comprehensive way for the first time. Of course, we cannot say at this point that if the employer's allegations are determined to be well founded, the existing bargaining units will necessarily be altered as the employer requests. It is clear to us, however, that if the employer's allegations are made out, redefinition of the bargaining units must be given serious consideration. In our view, the employer should be afforded the opportunity to establish its allegations.

Accordingly, we do not consider that the present applications come "too soon" after the previous "review", which was of a rather different nature. As we indicated earlier in these reasons, stability of bargaining units is desirable. In the instant case, the de facto units for collective bargaining have, for generations, been the craft units, even though for a time negotiations were conducted through the Council. While these units have, to a degree, evolved with time, they cannot be said to have been unstable.

We turn now to the third argument, that the company does not come to the Board "with clean hands". In Canadian National Railways (1975), 9 di 20; [1975] 1 Can LRBR 327; 75 CLLC 16,158 (CLRB no. 41), the Board dealt with an application dated August 16, 1974 to review a decision rendered on August 1 of that year. The Board outlined the various sorts of applications which it then felt might be made under section 18 (then section 119) of the Code - an employer application to review an allegedly outdated or otherwise inappropriate bargaining unit was not referred to - and in the course of its reasons made the following comment:

"...In addition, in deciding whether to grant such an application for review, the prior conduct of the applicant must be taken into account. If it was largely responsible for its own misfortune, it should normally not be allowed to ask the Board to re-open the file at a later date. An application for review provides a means for addressing a situation or problem that could not have been foreseen or satisfactorily dealt with earlier; it cannot or should not become a means by which a party attempts to remedy its own negligence. Accordingly, in such circumstances, an application for review should allege facts or considerations that were not brought to the attention of the Board at the time it made its original order or decision and these facts or considerations should be such that, had they been known to the Board, they might have led to the issuing of a different order or decision. Furthermore, some explanation must be given for the fact that these facts or considerations were not brought to the attention of the Board when it was conducting its original investigation. The applicant for review must come to the Board 'with clean hands'."

(Pages 26-27; 336; and 1185)

We quite agree with the principles expressed in that early case dealing with what is now section 18 of the Code. In that case the applicant sought review of a decision which the Board had issued some two weeks

previously, and it is clear from the decision that it sought to do so in order to put forward the case that it had failed to present when it previously had the opportunity to do so. The Board would, with respect, make the same decision in that case today, and for the same reasons. The instant case is quite different. The employer does not seek to review the decision in the 1986 case as such. It does not seek now to make the case which, as the respondents argue, it "ought" to have made then. The 1986 case was in fact a complex set of applications in which the present employer was in some cases a respondent, in some an interested party and in one at least the applicant. It might be said to have taken a position inconsistent with its present position, in that it sought the revocation of the certification of the Council. As we have said, however, the issue at that time was not the general desirability or otherwise of a "fragmented" unit, organized on craft lines, but rather the viability of the Council as an exclusive bargaining agent. In any event, the "clean hands" doctrine does not involve a requirement of consistency of position.

In his fourth argument, Mr. Church referred to the role the Board had played in establishing the present situation. The Board, of course, issued the certificates now held by the craft unions, in respect of their craft bargaining units, and we do, certainly, consider stability of bargaining units to be desirable. Again, however, it must be said that the 1986 decision simply did not involve the substantial issues which will now be before us. While on the surface it might appear that "the present situation" is one recently established by the Board, a more profound analysis, we consider, will

show that it - organization on craft lines - has been deeply entrenched for almost a century. To embark on a review of such units is neither a vacillating nor an inconsistent exercise.

With respect to Mr. Church's fifth and sixth arguments - that his clients, the smaller shopcraft unions, have, at some cost, complied with the 1986 decision, to which they were opposed, and that negative labour relations consequences will flow from the undertaking of the review itself - it can only be said that these things are true, but that they cannot be decisive considerations. It can equally be said that negative labour relations consequences would flow from our not undertaking this review. The proceedings may be time-consuming and expensive, but every proper effort will be made to keep those factors to a minimum.

The Board has a discretion under section 18 of the Code, including a discretion to enter into the enquiry at all. One element in the determination of whether to proceed or not is the "timeliness" of an application, in the sense in which we have used that expression here. For the reasons we have given, we consider that the present applications are "timely" in that sense, and these objections are dismissed.

III

We turn now to the third set of objections to the effect that neither the applications nor the particulars furnished in response to the Board's order meet the minimum criteria established by the Board to support a

lengthy review proceeding. To some extent, these objections naturally overlapped those dealt with in the preceding section of these reasons. Mr. Shields' first argument that in decision no. 556 the Board found that a fragmented unit was appropriate rather than a single-unit structure has thus been dealt with. Decision no. 556 held that a particular single-unit negotiation structure had not worked: it did not deal with the question whether bargaining unit organization on craft lines should be continued.

It was also argued that the relief sought by the employer in these applications is in the nature of things that can be achieved by collective bargaining, and that an application of this sort should not be used to permit the employer to achieve in this way what it could not achieve through the collective bargaining process. While it may be true that the employer considers that it would be more likely to succeed in achieving collective agreement rules with respect to, say, flexibility of assignments if there were one bargaining unit rather than many that remains, of course, a matter for the bargaining itself. The unions' argument, with respect, is not to the point. no decision of this Board in an application such as this would give a party what it could not get through collective bargaining. Rather, our goal in establishing bargaining units is to facilitate a realistic and fair bargaining process. It is through that process that the company must seek to achieve its bargaining aims and the union, at the same time, its own.

Mr. Shields referred to a number of criteria established by the Board in previous section 18 applications. To a

large extent, these have been dealt with in the foregoing reasons. Thus, we have indicated that the applications allege facts which would, at least arguably, justify a review of bargaining units. We have indicated, as well, that this is not a situation to which the concept or requirement of "new evidence" is germane. Counsel referred, however, to four further criteria, elaborated in various of the Board's decisions, which are indeed appropriate. They are closely related, and may simply be different expressions of the same principle. They are (1) that the applicant must demonstrate in the application that the unit proposed is more appropriate and will lead to a more harmonious relationship, not possible in the present structure; (2) that the applicant must show that the present structure or bargaining agents have resulted in poor or impossible labour relations; (3) that the applicant must show there is no longer a divergence of interest between the members of the various bargaining units; and (4) that the applicant must show that the present structure is not viable.

These criteria can be extracted from the various decisions the Board has made in section 18 applications. Their application, like their formulation, is to be understood in each case having regard to the actual context. Care must be taken in the use of criteria such as that stated in (1) above. The application itself, of course, does not "demonstrate", but must allege facts which, if established, would demonstrate the need for a redefinition of the bargaining unit. Mr. Shields made it clear that that is what he meant. In the instant case, as we indicated earlier with respect to our recent decision in Canada Post Corporation, we consider that the

applications do allege facts of that nature, in that, if the allegations are made out, we would give serious consideration to the redefinition of the bargaining units in question. The question, however, is a policy question, and not one to be addressed as though it were a matter of property rights.

In the instant case, it is our view that the application does contain allegations of a sort which we consider should be heard and which, if established, might lead the Board to redefine the unit or units of employees of the employer appropriate for collective bargaining. This Board might, we repeat, do the same of its own motion.

For the foregoing reasons, we conclude that the applications do set out a "prima facie" case, in the sense that to proceed with the hearing of this matter would be, in our view, consistent with the obligations of this Board and with its policies as expressed in previous cases.


IV

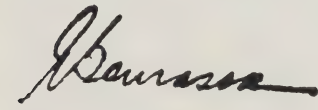
Finally, we turn to the matter of the sufficiency of the particulars furnished by the employer pursuant to the Board's ruling of November 15, 1990. In our view, those particulars do satisfy the rather limited requirements imposed by the Board. To the extent that any significant conclusion may turn on a finding in respect of a contested particular fact it may be either that the Board will, on objection by a respondent or on its own motion, refuse the employer permission to adduce evidence with respect to that fact, unless it was specifically alleged,

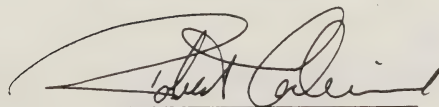
or that, if there is genuine surprise, it will adjourn the proceedings to allow the respondents to prepare themselves to deal with the matter.

It is to be borne in mind, we say again, that proceedings such as this may be instituted by the Board itself and that the Board may, in the course of proceedings such as these, require the parties to produce such materials or evidence deemed necessary, and the Board is not bound in this respect by the parties' "pleadings".

The Board will proceed to hear these matters on the dates and at the places of which the parties have been advised.


J.F.W. Weatherill
Chairman


Evelyn Bourassa
Member of the Board


Robert Cadieux
Member of the Board

ISSUED AT OTTAWA, this 11th day of January, 1991.

information

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SUMMARY

CANADIAN BROADCASTING CORPORATION, EMPLOYER, ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS; CANADIAN WIRE SERVICE GUILD, LOCAL 213 OF THE NEWSPAPER GUILD; CANADIAN UNION OF PUBLIC EMPLOYEES; NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS; ASSOCIATION OF TELEVISION PRODUCERS AND DIRECTORS (TORONTO); CANADIAN TELEVISION PRODUCERS' AND DIRECTORS' ASSOCIATION; NATIONAL RADIO PRODUCERS' ASSOCIATION; UNITED STEELWORKERS OF AMERICA; DIRECTORS' GUILD OF CANADA; INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA; AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA; SERVICE EMPLOYEES' INTERNATIONAL UNION; CBC MANAGERS' ASSOCIATION; SOCIÉTÉ DES AUTEURS, RECHERCHISTES, DOCUMENTALISTES ET COMPOSITEURS; SYNDICAT DES JOURNALISTES DE RADIO-CANADA; UNION DES ARTISTES; SYNDICAT DES EMPLOYÉS DE PRODUCTION DU QUÉBEC ET DE L'ACADIE; SYNDICAT DES TECHNICIENS DU RÉSEAU FRANÇAIS DE RADIO-CANADA; ASSOCIATION DES RÉALISATEURS DE LA RADIO, ASSOCIATION DES RÉALISATEURS, FOREIGN CORRESPONDENTS' ASSOCIATION, UNIONS AND CLAUDE LATRÉMOUILLE, INTERVENOR.

Board File: 530-1827

Decision No.: 846

This case deals with a global review of the bargaining unit structure, pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations). The application was allowed. Interim decision pursuant to section 20.

CBC filed an application seeking to rationalize the current bargaining structures in its French (Radio-Canada) and English (CBC) services. This decision deals with CBC, some of whose certifications date back to the 1950's.

The Board retained three principles:

- (1) The bargaining units should be universal rather than enumerative.

RÉSUMÉ

LA SOCIÉTÉ RADIO-CANADA, EMPLOYEUR, ALLIANCE DES ARTISTES CANADIENS DU CINÉMA, DE LA TÉLÉVISION ET DE LA RADIO; GUILDE DES SERVICES DE PRESSE DU CANADA, SECTION LOCALE 213 DE LA GUILDE DES JOURNALISTES; SYNDICAT CANADIEN DE LA FONCTION PUBLIQUE; ASSOCIATION NATIONALE DES EMPLOYÉS ET TECHNICIENS EN RADIODIFFUSION; ASSOCIATION OF TELEVISION PRODUCERS AND DIRECTORS (TORONTO); ASSOCIATION CANADIENNE DES RÉALISATEURS DE TÉLÉVISION; ASSOCIATION NATIONALE DES RÉALISATEURS DE LA RADIO; MÉTALLURGISTES UNIS D'AMÉRIQUE; DIRECTORS' GUILD OF CANADA; ALLIANCE INTERNATIONALE DES EMPLOYÉS DE LA SCÈNE ET DES PROJECTIONNISTES DES ÉTATS-UNIS ET DU CANADA; AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA; UNION INTERNATIONALE DES EMPLOYÉS DE SERVICE; ASSOCIATION DES CADRES DE RADIO-CANADA; SOCIÉTÉ DES AUTEURS, RECHERCHISTES, DOCUMENTALISTES ET COMPOSITEURS; SYNDICAT DES JOURNALISTES DE RADIO-CANADA; UNION DES ARTISTES; SYNDICAT DES EMPLOYÉS DE PRODUCTION DU QUÉBEC ET DE L'ACADIE; SYNDICAT DES TECHNICIENS DU RÉSEAU FRANÇAIS DE RADIO-CANADA; ASSOCIATION DES RÉALISATEURS DE LA RADIO; ASSOCIATION DES RÉALISATEURS; ASSOCIATION DES CORRESPONDANTS A L'ÉTRANGER, SYNDICATS, ET CLAUDE LATRÉMOUILLE, INTERVENANT.

Dossiers du Conseil : 530-1827

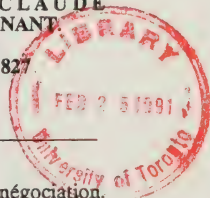
Décision n° : 846

Révision globale des unités de négociation. Code canadien du travail (Partie I - Relations industrielles), article 18. Requérante accueillie. Décision partielle en vertu de l'article 20.

Radio-Canada a présenté une requête afin de rationaliser toutes ses structures de négociation collective existant dans ses services français (Radio-Canada) et anglais (CBC). La présente décision concerne CBC dont certaines accréditations remontent aux années 1950.

Le Conseil a retenu trois principes:

- (1) Les unités de négociation doivent être décrites en termes génériques et non pas énumératifs.



(2) The unwarranted multiplication of bargaining units must be avoided.

(3) The supervisors should not belong to the same unit as those persons they supervise.

After considering the evidence adduced, the Board gave a general outline of four (4) bargaining units.

(i) Production and Presentation Unit

All on-air personnel and production employees, except supervisors.

(ii) Technical Trades and General Labour Unit

All technical support, maintenance and blue-collar employees, except supervisors.

(iii) General Administrative

All administrative and administrative support personnel, clerical, white-collar employees, except supervisors.

(iv) Supervisors

All employees whose core functions are supervisory.

The Board informed the parties that it reserved the right to provide a final description of each bargaining unit and that it could also divide the supervisory unit following an analysis of its specific composition.

2) Il faut éviter la multiplication injustifiée des unités de négociation.

3) Les superviseurs ne doivent pas être dans la même unité que les gens qu'ils surveillent.

Après analyse de la preuve, le Conseil a donné le profil général de quatre (4) unités de négociation regroupant tous les employés:

i) Personnel affecté à la réalisation et à la présentation

Tous les employés travaillant en ondes et le personnel affecté à la réalisation des émissions, sauf les superviseurs.

ii) Personnel technique, de métiers et les manoeuvres

Tout le personnel technique, d'entretien et les cols bleus, sauf les superviseurs.

iii) Administration et soutien administratif

Tout le personnel administratif et de bureau, de soutien administratif, les commis et les cols blancs, sauf les superviseurs.

iv) Les superviseurs

Tous les employés qui exercent des fonctions de supervision.

Le Conseil a informé les parties qu'il se réservait de préciser ultérieurement la description définitive de chaque unité et qu'il pourrait également diviser l'unité des superviseurs après analyse de sa composition précise.

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Canadien des
Relations du
Travail

Reasons for decision

Canadian Broadcasting
Corporation,

employer,

and

Alliance of Canadian Cinema,
Television and Radio Artists,

and

Canadian Wire Service Guild,
Local 213 of the Newspaper
Guild,

and

Canadian Union of
Public Employees,

and

National Association of
Broadcast Employees and
Technicians,

and

Association of Television
Producers and Directors
(Toronto),

and

Canadian T e l e v i s i o n
Producers' and Directors'
Association,

and

National Radio Producers'
Association,

and

United Steelworkers of
America,

and

Directors' Guild of Canada,

and

International Alliance of
Theatrical Stage Employees
and Moving Picture Machine
Operators of the United
States and Canada,

and

American Federation of
Musicians of the United
States and Canada,

and

Service E m p l o y e e s '
International Union,

and

CBC Managers' Association,

and

Société des auteurs,
recherchistes,
documentalistes et
compositeurs,

and

Syndicat des journalistes de
Radio-Canada,

and

Union des artistes,

and

Syndicat des employés de
production du Québec et de
l'Acadie,

and

Syndicat des techniciens du
réseau français de Radio-
Canada,

and

Association des réalisateurs
de la radio,

and

Association des
réalisateurs,

and

Foreign Correspondents'
Association,

unions,

and

Claude Latrémouille,

intervenor.

Board File: 530-1827

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Mr. Jacques Alary and Mr. François Bastien, Members.

Appearances:

Ms. Suzanne Thibaudeau, Q.C., and Mr. Guy Dufort, for the applicant;

Mr. Laurence C. Arnold, for the Alliance of Canadian Cinema, Television and Radio Artists;

Mr. Aubrey E. Golden, Q.C., and Ms. Bertha Greenstein, for the Canadian Wire Service Guild, Local 213 of the Newspaper Guild;

Mr. Gaston Nadeau, for the Canadian Union of Public Employees;

Mr. Ronald Pink, for the National Association of Broadcast Employees and Technicians;

Ms. Cathy Lace, for the Association of Television Producers and Directors (Toronto) and for the Canadian Television Producers' and Directors' Association;

Ms. Kate Hughes, Mr. Richard Blair, and Ms. Elizabeth Lennon, for the National Radio Producers' Association;

Mr. Jason Paikowsky, for the Directors' Guild of Canada;

Mr. T.W.G. Pratt, for the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada;

Mr. Robert Castiglio and Ms. Claire Fortin, for the Société des auteurs, recherchistes, documentalistes et compositeurs;

Mr. Daniel Carrier, for the Syndicat des journalistes de Radio-Canada;

Ms. Louise Cadieux, for the Union des artistes;

Mr. Pierre Grenier, for the Syndicat des employés de production du Québec et de l'Acadie;

Mr. Gino Castiglio, for the Syndicat des techniciens du réseau français de Radio-Canada;

Mr. Allen Gottheil, pour l'Association des réalisateurs de la radio;

Mr. Jean-Pierre Belhumeur, for the Association des réalisateurs;

and

Mr. Claude Latrémouille, intervenor.

I

The Application

This case deals with an application as amended filed with the Board pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) by the Canadian Broadcasting Corporation (CBC or the employer) on March 15, 1990 and aimed in essence at its English services.

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

Section 18 empowers the Board to review its own decisions or orders, a process most commonly used to update certification orders that the passage of time or other circumstances have rendered obsolete. Such is the purpose of the present application.

This is an interim decision pursuant to section 20 of the Code. It follows 15 days of hearings that took place in Ottawa.

II

Background

This application is the culmination of a series of proceedings, the first of which date back to 1982 (530-871; 530-1093; 530-1410; 610-78; 610-79). Without going into details, it is fair to say that their overall

thrust and intent was to have the Board define, clarify or, in some cases, amend the certification orders granted to the Canadian Wire Service Guild (the Guild), the Canadian Union of Public Employees (CUPE), the National Association of Broadcast Employees and Technicians (NABET), or any producer union (such as ATPD, and NRPA).

These proceedings were long left in abeyance by the Board as other parallel proceedings, notably from the CBC's French counterpart, went on before the Board (see Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRBR no. 383)).

These had led to lengthy hearings starting in 1986 and concluding after some 40 days of hearings and 63 witnesses.

Notwithstanding the fact that under the Code the Board may proprio motu initiate the process of reviewing certification orders (Re Latrémouille and Canada Labour Relations Board (1985), 17 D.L.R. (4th) 709 (F.C.A.)), it decided in the instant case not to do so, leaving it to the parties to take such an initiative with regard to the inappropriateness of some bargaining units.

Late in 1989, the Board advised the parties that, unless they themselves raised those matters, it would confine itself to a strict ad hoc individual case approach leaving the broader issues for the parties to resolve. It is trite, yet not inappropriate, to note that all too often parties faced with tough decisions on difficult and real issues look to the Board to get them off the hook. The Board may then become a convenient scapegoat something which only pushes further back the day when the parties

inevitably have to come to terms with their own industrial relations realities.

The genesis of the proceedings in which the Board found itself engaged in at that time was a host of actual or potential jurisdictional disputes among a number of unions involved in the preparation and presentation of programmes (Guild, NABET, CUPE, ATPD, CTPDA). The Board was asked to interpret, rather than alter, the jurisdictional scope of the certification orders of different unions involved in the information function at the CBC, which is split between news and current affairs. Another issue related to the use of portable cameras (ENG/EFP), the exclusive jurisdiction of which had led to a dispute between NABET and CUPE.

III

Evidence

With the consent of the parties, all evidence pertaining to the previous proceedings referred to above was transferred to the present case. In summary, this evidence included an overview of CBC's operations and often centered on subtle points of difference between news and current affairs. A single example illustrates the point.

At some point in the proceedings, the Board asked that a taped copy of The Journal and The National broadcast dealing with the federal budget leak of April 26, 1989 be filed. Also filed was a list of all those who took part in the production of these programs together with their union affiliation (Exhibits 130 and 156).

Against the evidence that the basic, not to say the only, thrust of both programs was the event itself, its sources and likely ramifications, some parties stuck to the argument that a fundamental distinction existed between news and current affairs for labour relations purposes. Its attendant consequence would be that two separate units composed of employees involved in the preparation and presentation of shows in the two divisions would be maintained.

As mentioned earlier, some were quite content not to commit themselves, probably hoping that the Board would decide on its own to review, wholly or partly, CBC's bargaining units.

It is a well-known fact that CLC affiliates are bound by inter-union jurisdictional agreements, the effect of which is often to hinder their quest for more adaptable forms of bargaining units. Internal rules take precedence over evolving industrial relations realities. This leads to indirect resolution through arbitration or ad hoc deals with the employer. It is only after the Board made clear its intention not to proceed on its own that the parties decided, in the wake of the CBC application, to engage in a wholesale review of the CBC's bargaining unit structure.

Thus, the Board was seized with two applications from the CBC, this one included, whose object is to review the bargaining structure in the two networks and, more particularly, the existing certification orders with a view to making them consistent with the current production and programming realities.

IV

The application and cross-applications

CBC

According to the CBC, the bargaining units that should emerge from the present proceedings are the following:

"a) Program presentation unit

This unit to cover all persons employed on-air outside the Province of Quebec and Moncton, N.B.; including those who prepare material for them, but excluding performers (actors, dancers, singers, puppeteers, specialty acts, stunt performers, extras, etc.) and writers (drama, variety, short stories) as well as those persons engaged to express their opinion as experts or are dealing with matters of current public concern and existing exclusions as contained in the applicable current collective agreements.

...

b) Program production unit

This unit to cover employees in radio/television program production support employed outside the Province of Quebec and Moncton, N.B.; including technical and transmitter maintenance.

...

c) Administrative unit

This unit to cover employees engaged in administrative, clerical, secretarial, and support activities employed outside the Province of Quebec and Moncton, N.B.

...

d) A TV Producers unit

This unit to cover TV Producers employed outside the Province of Quebec and Moncton, N.B.

...

e) A Radio producers unit

This unit to cover radio producers employed outside the Province of Quebec and Moncton, N.B.

f) A Security Guards unit

This unit to cover security guards employed in the city of Ottawa excluding security supervisors and those above."

(letter dated November 9, 1990, pages 2-3;
emphasis added)

OTHER PARTIES

For their part, some of the certified bargaining agents, as well as ACTRA, which concurrently filed an application for certification (Board file 555-3114), asked the Board to review certification orders and to amend the units covered. The main parties' general position on the structure and scope of these units can be summarized as follows:

a) Canadian Wire Service Guild (CWSG)

The Guild supports in broad terms the five units proposed by the CBC. With respect to the Program Presentation Unit, it accepts the description put forward by the CBC, except for the proposed exclusion of Moncton; in addition, it supports the exclusion of security guards from the proposed Administration Unit suggesting that they be put in a separate unit in accordance with recognized labour relations principles.

b) National Radio Producers Association (NRPA)

It takes no position on the number of units but argues that the description of the "radio producers unit" which is appropriate for collective bargaining is that which is contained in the original certification order of the Board dated June 21, 1984. In the alternative and assuming that larger units are created, it supports CUPE's proposal to create a single programming unit, which includes radio producers, in addition to two other units.

c) Association of Television Producers and Directors (Toronto) (ATPD) and Canadian Television Producers' and Directors' Association (CTPDA)

The two associations filed no submission as to the number or configuration of bargaining units. With regard to the producer unit, they propose that there should be a comprehensive producer unit which includes those employees they currently represent, together with certain employees, some of whom they represent and some of whom they do not, who perform related or cognate functions. The intended scope is to include all those who participate in the creative production process from entry-level positions to executive producer.

d) National Association of Broadcast Employees and Technicians (NABET)

Its submission is that, ideally, one large, all-employee bargaining unit would be the most appropriate for collective bargaining purposes. Its benefits would be to lessen jurisdictional disputes among employee classifications, and to create a strong cohesive group to bargain collectively with the employer, thereby contributing to stable labour relations and better mobility of employees. However, in realistic and practical terms, it suggests the creation of four or five units as proposed by the CBC. It takes no strong position on whether producers should be one or two units.

e) Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)

It makes no representation with respect to any unit other than the proposed English Language Programme Presentation Unit. Its preferred unit in this regard is one which comprises all persons employed on air (TV and Radio),

together with those who prepare material for use on air in English Language Programming throughout Canada, save and except musicians and composers. In the alternative, it proposes two Programme Presentation Units described as follows:

(i) all staff employees employed on air (TV and Radio), together with those who prepare material for use on air in English Language Programming throughout Canada, save and except musicians and composers;

(ii) all non-staff persons, engaged pursuant to contracts of employment, and performing on-air duties (TV and Radio), together with those who prepare material for use on air in English Language Programming throughout Canada, save and except musicians and composers.

As a final alternative, ACTRA proposes that the status quo be maintained.

f) Canadian Union of Public Employees (CUPE)

It supports the notion of a complete redesign of the units at the CBC. The general configuration of the bargaining units pertaining to English service locations should consist of three bargaining units whose scope would extend to all non-supervisory employees. These units should be:

(i) the Programming Unit, or all employees employed in the preparation and presentation of programs;

(ii) the Production Unit, or all employees employed in the production of programs;

(iii) the General Unit, or all the other employees.

As part of its submission, CUPE provided a detailed listing of the classifications or functions falling within the purview of these units.

V

The Networks

Since practically the time of its creation, the corporation which broadcasts in French under its Radio-Canada name, and in English under its CBC one, referred to these language-based services as "networks." This designation, however imprecise, has to refer to the de facto existence of two separate groups of production centres: one in French, for the province of Quebec and Moncton; the other, the English one for the rest of the country.

It is through these production centres that local radio or TV programmes are produced in one or the other language, or in both through the sharing of local facilities. Each of these centres has a dominant or primary language of work. The practice is to use French as the primary language of production in Quebec and Moncton, and English elsewhere.

For instance, Toronto is administratively speaking an English network centre. Thus, a show produced in Toronto in French is identified to its originating network not by the language in which it is aired, but by the primary language of production in use in that particular region, i.e. English in the present case. In Montréal, English productions are identified to, or generated by, the French network.

The Board has already issued an interim decision in this regard (Canadian Broadcasting Corporation, June 7, 1990 (LD 849)). CBC's initial proceedings covered both the English and French networks. Had the Board not decided to rule first on the question of the delineation of the two networks, a situation would have ensued where all unions concerned, approximately 30, would have had to participate in all the proceedings on both sides of the network divide. It is useless to comment on the enormous investment of time and resources this could have represented. It is in this context that the Board decided to issue an interim decision on the matter of networks.

"It notes that some obvious anomalies exist in the present bargaining structure at CBC, with respect to territorial scope. It appears in fact that production centres are generally included for collective bargaining purposes in one or the other so-called networks. In certain bargaining units, in Moncton or Montréal, persons working together in one production centre are sometimes represented for collective bargaining purposes by bargaining agents from different networks. This situation seems abnormal given the prevailing conditions in the various production centres.

The Board considers that, unless compelling labour relations reasons are given, all persons working in one production centre will be members of bargaining units associated with one network. Specifically, the Board expects that all bargaining agents be linked to one or the other network and that, unless warranted for labour relations purposes, the division remain the same for all."

(pages 2-3)

Nothing we have heard since would justify that we depart from that finding with respect to the delineation between the networks and each one's extension.

VI

Media

Apart from the language split, CBC broadcasts on radio as well as on TV.

Production centres are by and large integrated ones where persons employed on the radio or TV side are currently, or soon will be lodged in the same facilities under a common management structure.

Having said this, radio and television are treated as separate entities as far as programming is concerned. They are markedly different in the eyes of the people who work there, regardless of their particular profession. In spite of the different technology used, the two media are said to be similar in that they are both committed to the development, production and broadcasting of programs as per the broad terms of the single mandate conferred upon the Corporation by the Broadcasting Act.

To this day, the organization at the CBC reflects the fact that, historically, radio predated television. Programming is medium-based and under separate management except at the top of the corporate pyramid. However, in labour relations terms, both media are under joint management and operate under similar rules and constraints. As for actual program output, it originates of course from a single concern and, as mentioned, people often work on the same premises.

Within the English network, only producers are certified or recognized as bargaining agents on a strict medium basis. The National Radio Producers' Association (NRPA)

is confined solely to radio while CTPDA and ATPD represent TV producers exclusively. Both TV producers associations, that now wish to be merged, challenge the notion of a separate radio producers' unit, and argue for the creation of a single producers unit. NRPA takes the opposite view but acknowledges that a broader bargaining unit made up of producers and non-producers would be appropriate for bargaining.

One of the issues raised relates, consequently, to the appropriateness of maintaining for labour relations purposes the current distinction between radio and television producers units.

VII

Current Units

It is useful for our purpose to identify the current bargaining units and to differentiate those for which this Board issued certificates from those for which voluntary recognition clauses exist. A summary of the bargaining certificates in existence for both the French and the English services is appended to the original of this decision as Appendix "A". Similarly, all voluntary recognitions so described by the employer are also appended as Appendix "B".

According to the CBC, it is bound by voluntary recognition clauses found in a number of so-called collective agreements, applicable to certain English network locations. The Board does not need at this stage to determine the very status of these documents, but instead may take for granted the fact that the persons concerned

are indeed employees under the Code, and that the documents referred to are indeed collective agreements.

When they were not already acting as respondents, all bargaining agents, unions, or persons interested in these proceedings or covered by certification orders or voluntary recognition clauses were called as mis-en-cause. All certified bargaining agents followed the proceedings, save for the Steelworkers and the SEIU. When they appeared the two groups did not challenge the application nor did they take an active part.

Other groups never responded to our notification letter. They are:

1. American Federation of Musicians of the United States and Canada (AFM);
2. Professional Association of Technical Producers;
3. Foreign Correspondents' Association.

VIII

Evidence

This procedure marks the consolidation and culmination of a series of proceedings. Documents filed with, referred to or considered by the Board number in the hundreds, and transcripts of witnesses' evidence will total thousands and thousands of pages. To try to summarize them would be foolhardy; in addition, parties were advised that the Board's deliberations would be straightforward and the reasons for decision relatively short.

Having said this, what emerges from the evidence is the fact that all those associated with CBC share a deep sense

of belonging and intense pride. This strong cohesiveness has withstood the challenge of the immense territory the English network spans and the wide spreading of its resources. However personal the spin put on individual accounts of work experiences at the CBC, there was invariably the deep impression conveyed of a team effort. Be they from TV or radio, all crafts and professions blend in a unique, coordinated way to deliver a high-quality product.

A dominating feature of today's TV production is the advent of a highly technical environment, intensely computerized and miniaturized, where the portable camera has displaced its mastodonic ancestor; where video replaces film; where taped programs, not live ones, are now the norm. Radio has undergone similar transformations marked by increased computerization, miniaturization and response time, all contributing to even greater technical advances. A new feature is global competition where CBC was often alone in the past.

Traditionally, CBC used to organize itself in neatly divided and circumscribed divisions such as news, current affairs, agriculture, religious affairs, drama, sports, etc. In those days, responsibilities and functions were clearly delineated and expected to last for some durable period of time. Not anymore. So called current affairs programs may feature a large diversity of components: varieties, news, music, drama, etc. The content of a show often relates only marginally to the department division from which it originates, this decision being increasingly based on financial or administrative considerations. The lines between various departments are getting increasingly blurred as flexibility is required. A department-based

demarcation is consequently a poor, if not an unpredictable or even illogical guide to a definition of jurisdictions or bargaining units.

What is clear from the wealth of information on how programs are produced is that, irrespective of the final product, there is a core of constant, if not interchangeable, ingredients going into their production. Among these ingredients are intangibles such as creativity and professional expertise, more tangible ones like research, writing and a host of varied skills associated with the various phases of the pre-production, production and post-production process.

The production of a show requires intellectual as well as technical skills. All these elements depend for their ultimate success on a healthy measure of tight coordination and large flexibility at all levels of production. At the end of the line, the product has to fend for itself in an intensely competitive environment.

A number of technological advances in the field of radio and television is another factor that has contributed to the blurring of traditional lines among crafts and functions. This trend is likely to turn into a tide in the foreseeable future. Job titles may endure but even a cursory look at the descriptions of the duties involved gives a good idea of the extent to which change has taken place. In the future, employees will see their roles further enlarged within their respective production units, going much beyond the carrying out of orders. Conversely, "order-issuers" who are without any technical expertise will become an endangered species. In sum, traditional

skills and crafts are imploding and giving way to increased professional mobility. People's aspirations are the mirror image of those changes.

Technological change has fuelled disputes between NABET and CUPE's (production group). NABET relies on the presence of a machine to claim work jurisdiction; for CUPE, the operation of such portable equipment is totally different from that of the old film or TV cameras. In short, the technical requirements have undergone a radical transformation and this must be reflected in the bargaining structures.

Similarly, graphic designers who used to work with quill pens have migrated to computer screens and keyboards. For some, the technical link to the keyboard makes the job a NABET one; for others, the keyboard is no more than what the pen used to be, i.e. a tool which should have no bearing on job jurisdiction.

The blurring of traditional lines between CBC's departments brought about by corporate and technological development has paralleled the erosion of the tight compartmentalization, grey areas notwithstanding, among different skills and crafts, and is likely to continue unabated. Today's jobs bear little resemblance to the ones found at the time the present bargaining units were developed.

In those days, the outside shooting of news footage required a van equipped with a full-fledged technical team, a film laboratory and an audio and video editing team. The same footage today often only requires no more

than a two- or three-person team, including the journalist, and the laboratory is history.

Key requirements in today's production process are response time, frugality, flexibility and mobility regardless of the type of shows. In a type of program such as The Journal, there is no reporter but, instead, a variety of jobs ranging from writers and interviewers to producers. Job lines have clearly evaporated.

Boundaries, as defined by collective agreements and old bargaining certificates, are now without any logical basis. In addition, some classifications born of voluntary recognition overlap, and at times duplicate, those covered in existing orders, only adding to the confusion.

For instance, ATPD cited no less than fifteen producers assigned to the production of The Journal. The team also includes researchers/programmers represented by ACTRA, not to mention its hosts whose work jurisdiction varies from year to year. Inversely, it has no editor or reporter. For The National, there are ten producers or so, many more reporters but no ACTRA-affiliated personnel.

While all these persons are doing similar work they belong to different bargaining units. Paul Griffin, a long-time CUPE announcer, had to resign from the CBC in order to join The Journal as a co-host. He was then reappointed under the terms of the relevant ACTRA collective agreement. For some of his assignments, he had to join ATPD much like Ann Medina or other journalists from The

Journal when they research or write texts to be delivered on air.

But this is not the end of Mr. Griffin's story. Transferred to the Newsworld, he ceased to be represented by ACTRA and was rehired on probation as per the terms of the CUPE convention. During his probation, he was dismissed without any recourse as any employee on probation presumably can be. The matter is pending arbitration.

This demonstrates, and many other examples abound, the need for unions and management to revisit the issue of devising a more efficient and intelligent bargaining relationship, i.e. a framework appropriate within the meaning of section 24 of the Code.

On the radio side, there will be or will not be NRPA producers on a program, depending on what was negotiated. Of course, someone will do the work but from a different union.

The overall result is a state of permanent confusion where job titles or jurisdictional lines among bargaining units become meaningless.

IX

Analysis

A look into the certification orders and voluntary recognition clauses currently in effect at the CBC reveals that a number of them go back as far as the 1950's. They were of the enumerative type and often linked groups of employees to specific departments; for instance Guild-

affiliated employees are tied to the News department. The same applies to CUPE's certification orders which are enumerative and comprise a number of obsolete classifications.

In large part those orders were issued by the "Old Board" and without reference to the overall operations of the CBC in the definition of a given unit found to be appropriate. It is clear that even recently, units have been defined strictly on the basis of the particular group for which certification was sought without any consideration being given to the situation of that group within the overall structure.

All this has led to the appearance of voluntary recognitions whose rationality is far from obvious. Irrespective of one definition or another, what is clear is that the present application leaves the Board little choice but to consider in its entirety the structure of existing bargaining units at the CBC in the search of what constitutes appropriateness as applied to the units sought. Parties have argued before us the point of whether this application constitutes a global or limited review. For the Board, this is a moot point to the extent that these questions, whether general or specific, cannot be answered without reference to the whole of the bargaining relationship.

We could elaborate at length on the reasons for reaching the conclusions that follow. Suffice it to say that they rest on the following well-established principles as evidenced in the Board's long jurisprudence:

1. Bargaining units must be defined in general terms (Teleglobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRBR no. 198)).
2. There should be, as a matter of basic principle, one unit for all employees. Units should not be fragmented or their numbers increased except for compelling reasons (Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRBR no. 675)).
3. Supervisory personnel should not be in the same unit as the employees they supervise. (For a recent review of the Board's jurisprudence on the issue, see Island Telephone Company Limited (1990), as yet unreported CLRBR decision no. 811).

Another key consideration relates to the public nature of the CBC. CBC does not constitute what is commonly and strictly referred to as an essential service, i.e. one where public health and safety is put at risk when it is interrupted. The fact remains that it dispenses a public service, funded in large part by taxpayers' money, and that it would be ill-advised to institute a collective bargaining structure exposed to a potential multiplicity of conflicts or sequential shut-downs.

The Board has reviewed the certification orders pertaining to the producers in the light of its oft-stated requirements for a generic definition of units and reduction of their number.

The current orders are based on job titles which cover a wide range of functions; nonetheless they fall short of

these two requirements. In fact, the applications for review and arguments put forward by the Guild and the producers within ATPD and CTPDA, as well as CUPE, clearly indicate that production personnel consists of far more than producers. Teamwork is what we are dealing with, and all the well-established criteria relating to the matter of community of interest strongly suggests that its many components be put together. Even the alternate position submitted by the NRPA aims in the same direction and supports this view.

X

Conclusion

In light of the aforementioned principles, and after having fully considered the arguments put forward by the parties as well as the entire evidence, the Board concludes as follows with respect to the number of units at the CBC and their general profile.

First, there are to be four bargaining units, three of which will comprise supervised employees and one covering supervisors.

All these units shall be defined in generic terms.

Third, these units are all-encompassing, i.e. they comprise all employees of the CBC save for exclusions whose determination will be the subject of Phase II of these proceedings.

As for the general profile, it will be as follows:

1. Program Production and Presentation Unit

All on-air personnel plus all personnel whose core functions are associated with the elaboration, the preparation, the production, the coordination and the completion of programs, with the exception of those whose core functions consist of supervisory duties.

2. Technical, Trades & General Labour

All personnel whose core functions are technical, maintenance, trade and general labour, with the exception of those whose core functions consist of supervisory duties. This unit will comprise all technical as well as blue collar personnel.

3. General Administrative Unit

All personnel whose core functions are secretarial and clerical, or of an administrative nature such as financial services, personnel services, sales, etc., or of a white-collar nature with the exception of those whose core functions consist of supervisory duties. This unit is to regroup all administrative and administrative support personnel.

4. Supervisory Personnel Unit

All those whose core functions are of a supervisory nature.

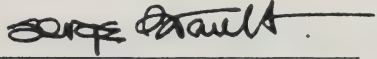
Once the real complement of supervisors is determined, the Board reserves its right to further divide their unit should it find that it would be appropriate to do so for collective bargaining purposes.

Insofar as the Ottawa security guards unit is concerned, the Board finds in the context of these proceedings that their bargaining unit is no longer appropriate for collective bargaining. Therefore, these employees shall be merged in one of the general bargaining units set out earlier after the Board has received the interested parties' submissions on the matter.

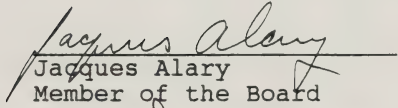
In closing, the Board wishes to stress the fact that it did not find suitable to address at this time the issue of specific exclusions from any of the units defined above.

The employer as well as some of the unions have expressed the view that specific positions or types of contractual relationships should fall under special terms and therefore be excluded from one or the other units on those grounds. Reference was made to such considerations as legal peculiarities, confidentiality, board jurisdiction, etc. Such issues and that of confidentiality will therefore be addressed in Phase II where the final description of each of the units will be determined.

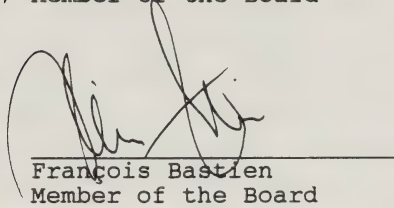
Further instructions will be communicated to the parties in the days ahead with regard to Phase II of these proceedings.



Serge Brault
Vice-Chairman



Jacques Alary
Member of the Board



François Bastien
Member of the Board

DATED at Ottawa, this 15th day of January 1991.

CCRT/CLRB - 846

APPENDIX "A"

CURRENT CERTIFICATIONS AT CBC AND RADIO-CANADA

* WHERE THE CERTIFICATES WERE NOT ISSUED IN THE TWO OFFICIAL LANGUAGES, THIS DOCUMENT ONLY USES THE OFFICIAL VERSION.

CANADIAN WIRE SERVICE GUILD, LOCAL 213 OF THE NEWSPAPER GUILD (CWSG)

The Guild was first certified (File 766-316; 26/05/52) for editorial employees of the Canadian Broadcasting Corporation, employed in Canada in the National and International News Service of the respondent, comprising employees classified as senior editor (at points where the newsroom is headed by an editor-in-charge), editor, associate editor, news roundup editor, assistant news roundup editor, reporter, news writer, news editor, editor Canadian Chronicle, assistant editor Canadian Chronicle, reporter Canadian Chronicle, editor French section, reporter French section, and copy clerk, and excluding employees classified as editor-in-charge and those above that rank, senior editor (at points having no editor-in-charge), and senior editor (English) Montreal.

Later (File 766-407; 15/05/53), its certification was extended to all employees in the News Service engaged in the preparation of news for television, save and except newsreel editors-in-charge and employees above that rank.

On 18/05/82 (File 530-844), the Board amended the certification by including employees performing in relation to French programming, the functions of moderator, commentator, interviewer, reader, narrator, panellist and meteorologist (commentator) who work on news, public affairs and current events programs in locations other than Montreal, Quebec and Rimouski.

In File 530-1350 (24/03/86), the Board ordered that the orders concerning the Guild be further amended by excluding from its bargaining unit the employees working in Chicoutimi, Sept-Iles and Matane.

NATIONAL ASSOCIATION OF BROADCASTING EMPLOYEES AND
TECHNICIANS (NABET)

NABET was first certified in 1953 for technicians (ESD) (766-362; 08/01/53) and later (766-1439; 31/10/63) for the building maintenance group (BTG).

In 1982 (File 530-868), the Board ordered that the BTG unit be fragmented by creating a separate unit comprised of those employees working in the province of Quebec and in Moncton, New Brunswick.

Later (File 530-438; 30/04/84), the Board found it appropriate to consolidate the BTG Unit (766-1439) and the technicians (ESD) (766-362) unit under one certification order comprising all technicians and employees of the Building trades group (BTG), excluding supervisors and those above and those employees included in the STRF bargaining unit and the National Association of Broadcast Employees and Technicians' BTG unit comprising employees working in the Province of Quebec and in Moncton, N.B.

CANADIAN UNION OF PUBLIC EMPLOYEES (CUPE): OFFICE &
PROFESSIONAL EMPLOYEES UNIT

(File 766-390; 25/06/53)

Employees comprising announcer, announcer/producer, producer employed in the International Service (save and except those International Service producers hereinafter specifically excluded), junior producer, apprentice producer, producer trainee, program coordinator, program organizer, program officer, program clearance officer, program assistant, program research assistant, program listings editor, script editor, commentator, farm commentator, assistant farm and fisheries broadcasts commentator, editor (monitoring unit), assistant editor (monitoring unit), continuity writer, music copyist, sales representative, assistant sales representative, assistant purchasing agent, publicity editor, regional press and information representative, press and information representative, press and information assistant, information bureau assistant, reference librarian, music librarian, assistant reference librarian, clerk accounting, clerk audition, clerk departmental (including

clerk departmental 5, statistics department), clerk draftsman, clerk duplicating, clerk filing, clerk general (including clerk general 2 employed in central newsroom, Toronto), clerk music, clerk translator, clerk typist, IBM operator, receptionist, stenographer (including stenographer assigned as secretary to film supervisor, Montreal), secretary (including script assistant assigned as secretary to newsreel editor, Toronto), teletype operator, switchboard operator, office boy, caretaker, storekeeper, typewriter mechanic, engineering assistant, architectural draftsman, electrical draftsman, mechanical draftsman, building superintendent, junior building superintendent, senior clerk departmental, publications editor, microphone publicity editor, assistant to policy editor, assistant section head, statistical clerk, draftsman, assistant chief storekeeper, stores clerk, chauffeur, production assistant, assistant children program, assignment officer, assistant to supervisor of drama; and including temporary and casual employees in each of the above classifications; excluding the following employees in the National service: secretary 6 being secretary to general manager, secretary 4 being secretary to executive assistant, stenographer 2A in general manager's office, stenographer 3 being secretary to executive assistant, employed in Head Office, Ottawa; secretary 7 being secretary to chairman, senior clerk departmental 7 in the office of the chairman, stenographer 3 in the office of the chairman, employed in the offices of the Board of Governors; stenographer 3 being secretary to legal adviser, Legal Department; departmental assistant 8 being assistant to regional representative at St. John's studios; secretary 4 being secretary to regional representative, Halifax studios; secretary to executive 5 being secretary to assistant general manager, stenographer 3 being secretary to executive assistant, employed in executive division, Radio Canada Building, Montreal; secretary 4 being secretary to regional representative at Winnipeg studios; secretary 4 being secretary to regional representative at Vancouver studios; and excluding the following employees at Headquarters, Radio Canada Building, Montreal, assigned to the P. and A. Division in its National Office, Personnel Department, Establishment (Staff Records), Leave Records, Welfare, Industrial Relations or Administration (Job and Wage Analysis) Section: secretary to executive 5 being

secretary to director, secretary 4 being secretary to assistant director, clerk departmental 4 (Personnel Department), stenographers 2A (Personnel Department), clerk departmental 4 (establishment, staff records), clerks general 3 (establishment, staff records), clerk general 3 (leave records), stenographer 2A being secretary to officer in charge of welfare plans, clerks departmental 4 (welfare), stenographer 3 being secretary to industrial relations officer, stenographer 3 being secretary to officer in charge of job and wage analysis; and excluding local staff in Radio Canada Building, Montreal, comprising stenographer 3, being secretary to the Personnel Relations Officer; stenographer 3, being secretary to Administration Officer, Montreal; clerk filing 3, in charge of confidential section of Central Registry; clerk filing 4, being the coder of the confidential section of Central Registry; clerks filing 3, in charge of checking out and checking in for the confidential section of Central Registry; and clerk filing 3 engaged as Precis clerk for all sections of Central Registry; and excluding employees engaged in the Central Registry of the Toronto offices classified as clerk filing 5, in charge of the confidential section, clerk filing 5, being the coder and charging-out clerk of the confidential section, and clerk filing 3, being the checking-in clerk of the confidential section; and excluding: clerks filing 3, 4 or 5 (or supervisor of records) in charge of Central Registries at St. John's studios, Halifax Studios, Sackville Transmitter, Quebec Studios, Chicoutimi Studios, Ottawa Studios, Winnipeg Studios; and excluding clerks filing 3, in charge of confidential sections of the Central Registries of the Winnipeg Studios, Edmonton Studios, and Vancouver Studios; and clerk filing 5 in charge of confidential files at Head Office, Central Registry; and excluding clerks departmental 4 or stenographers 2A or 3 employed in the P. & A. Division or the Program Division and engaged as secretaries to Station Managers and/or Regional Program Directors at Quebec Studios, Chicoutimi Studios, Prince Rupert Studios, Gander Studios and Transmitter, Grand Falls Studios and Transmitter, Halifax Studios, Sydney Studios, Ottawa Studios, Windsor Studios and Transmitter, Winnipeg Studios and Edmonton Studios; and excluding employees at Head Office, Ottawa, classified as senior clerk departmental 8 assigned as P. and A. representative, and H.O. secretary 4 assigned as secretary

to visiting executives; and excluding senior clerk departmental 7 in charge of local Personnel Office, Toronto; clerk departmental 4 engaged as Assistant Personnel Relations Officer, Toronto; stenographers 3 assigned to the local Personnel Office, Toronto; clerk departmental 5 engaged as P. and A. Assistant, Winnipeg Studios; and excluding employees of the Treasurer's Division stationed at Head Office, Ottawa, and classified as secretary 4 assigned as secretary to the Treasurer, and stenographer 3 assigned as secretary to the Assistant to the Treasurer; senior clerk departmental 6 attached to the office of the Treasurer; senior clerk departmental 7 engaged on Accounts Payable; senior clerk departmental 6 engaged on Travelling Accounts; senior clerk departmental 6 engaged on Commercial Revenue; clerk departmental 5 engaged on General Accounting; senior clerk departmental 6 engaged on statistical work; and excluding employees of the Insurance and Salaries Department, classified as senior clerk departmental 6, clerk departmental 4, clerk accounting 3, clerk general 2, and stenographer 2A; and excluding senior clerk departmental 7 engaged in the Cost Accounting and Budget Department, Treasurer's Division, Radio Canada Building, Montreal; and excluding employees of the Program Division classified as senior clerk departmental 6 engaged as secretary to Executive, Office of the Director General of Programs, Toronto offices, and stenographers 3 and 4 engaged as secretaries to Director General and Assistant Director General of Programs, Toronto Offices; secretary 4 engaged as secretary to Director, French network, Radio Canada Building, Montreal, policy editor 9; and excluding employees graded from 7 to 11 inclusive in the Program Division of the National Service classified as producer, producer commercial operations, producer editor, producer farm, producer program, producer talks, program organizer (T & P A), Regional Farm and Fisheries Broadcasts Commentator 8 (various locations); and School Broadcasts Organizer (Atlantic) 9; and excluding employees of the Engineering Division stationed at Radio Canada Building, Montreal, classified as properties supervisor, secretary to executive 5 assigned as secretary to Director General Engineering, secretary 4 assigned as secretary to Chief Engineer, stenographer 3 assigned as secretary to Assistant Director General Engineering; and stenographer 3 employed at Operations Headquarters, Engineering

Division as secretary to Operations Engineer; engineering assistant 7 employed in office of the Regional Engineer, Montreal, stenographer 3 and stenographer 2A employed at the local Operations Office, Montreal Area; and excluding employees of the Engineering Division stationed at Toronto and classified as engineering assistant 7 employed in the office of the Regional Engineer, Toronto, and stenographer 3 employed in local Operations Office, Toronto Area; employees of the Engineering Division classified as engineering assistant 7 stationed at Winnipeg, and employed as assistant to Regional Engineer, Winnipeg; and clerk departmental 4 stationed at Vancouver Studios and Transmitter engaged as secretary to Pacific Regional Engineer; and excluding employees of the Station Relations and Broadcast Regulations Division classified as secretary 4 at Toronto Offices assigned as secretary to the Director of Station Relations; and excluding employees of the Commercial Division classified as secretary to executive 5 stationed at Toronto Offices and assigned as secretary to the Commercial Manager; and excluding employee of the Press and Information Division classified as secretary 4 assigned as secretary to the P. & I. Director, Toronto Offices; and excluding personnel of the International Service, as follows: secretary 4 assigned as secretary to the Director-General, International Service; producer 8 (French Section) of the Program Division; producer 8 (Music) of the Executive Division; employees of the Spanish and Brazilian Sections of the Program Division classified as announcer-producer 7, editor-producer 7-8, producer 7, and clerk-translator 5, and engaged on contract; and excluding personnel of the Television Service, as follows: employees of the Executive Division classified as stenographer 3 assigned as secretary to the Director of Television, Montreal, and stenographer 3 assigned as secretary to the Director of Television, Toronto; and employees of the Program Division in the News Service engaged in the preparation of news for television.

(File 530-90; 19/01/76)

Later, the Board amended the certification by adding to the bargaining unit the classification of Secretary to the Regional Sales Manager - Prairie Region.

In 1980 (Files 530-623 and 530-562; 28/11/80), the Board finds it appropriate to divide the existing bargaining

unit (766-390 as amended) into two distinct bargaining units, one covering: "(a) the employees working at French Services Division (including Moncton, New Brunswick) (order 530-562), locations, Radio-Canada International and Northern Services in Montreal and at the engineering headquarters"; and the other covering: "(b) the employees working at English Services Division (including Northern Services) locations, in the Ottawa area and at the Head Office of the Corporation."

This led to two parallel units, one for Quebec and Moncton (French Division), the other for the rest of Canada (English Division).

(File 530-842; 18/05/82)

The Board only once amended the certification order issued for the English Service Division on November 28, 1980 (530-623) (ESD) to include in it the following positions: moderator, commentator, interviewer, reader, narrator, panellist and meteorologist (commentator), the duties of which are not performed as part of news, current affairs and public affairs broadcasts and are performed in conjunction with French-language programming, (i.e. outside of the province of Quebec and of Moncton, N.B.).

(File 530-563; 03/12/80)

The CLRB first amended the order concerning the French Division by adding to the bargaining unit set out therein the classification of "content analyst".

(File 530-645; 27/07/81)

The Board again amended the certification for the French Division by adding to the bargaining unit the classifications of guide and hostess for which CUPE had been certified back in 1975 (555-327).

(Files 530-706 and 530-841; 18/05/82)

The Board further amended the certification order dated November 28, 1980 (530-562) (FSD), as amended, to exclude from it the position, in Montreal, of announcer on news, public affairs and current affairs broadcasts; and to include the following positions: moderator, commentator, interviewer, reader, narrator, panellist and meteorologist (commentator) - not part of news, current affairs and public affairs broadcasts; and the positions of sports

reporter and sports writer with the exception of employees working on English-language programs who are represented by the Association of Canadian Television and Radio Artists.

CANADIAN UNION OF PUBLIC EMPLOYEES (CUPE): PRODUCTION GROUP

(File 530-236; 17/06/77)

Initially issued in 1968 (File 766-2025; 19/03/68 and File 766-92025; 24/04/68), the Board amended the existing certification in 1977 substituting therefor the following:

Employees of the Canadian Broadcasting Corporation working in or out of its various production centres working as designer, set designer, assistant set designer, design assistant, scenic estimator, design processor, graphic designer, designer's helper, assistant graphic designer, stat camera operator, scenic constructor crewleader, scenic constructor, film editor-in-charge, film production editor, presentation coordinator, production assistant (television), costume designer, assistant costume designer, cutter, tailor, senior seamstress, cutter/seamstress (regional), seamstress, dressmaker-in-charge, wardrobe master, senior wardrobe attendant, wardrobe attendant, design draftsman, film librarian, senior staging rigger, staging assistant crewleader, assistant film editor, negative cutter, film assistant, scenic artist crewleader, scenic artist, printer, shop helper, film cameraman, film camera operator, film cameraman assistant, still photographer, assistant still photographer, make-up artist, staging crewleader, service stagehand crewleader, staging assistant, stagehand, service stagehand, script assistant, senior set decorator, senior special effectsman, set decorator, special effectsman, fabric specialist crewleader, propman florist, fabric specialist, and film editor, excluding production employees already covered by an order of certification granted to NABET and the production employees of the French Services Division.

SYNDICAT DES EMPLOYES DE PRODUCTION DU QUÉBEC ET DE L'ACADIE (SEPQA)

(File 555-437; 17/06/77)

The SEPQA was certified for all production employees of the French Services Division excluding production employees already covered by an order of certification granted to NABET and the personnel supervising, the production employees of the French Services Division and those above as follows: FRENCH BROADCASTING: Information Service: director of information, supervisor of general services, chief of the registry, research supervisor, chief of information - public affairs, chief of information - television, chief of information - radio; FRENCH TELEVISION: Operations Service - TV: Film Service: supervisor of quality control, and assistant supervisor and those above; Scenographic Services: assistant supervisor and those above; Scenic Services: coordinator of estimates, set supervisor, supervisor of special effects and fabric specialists, assistant supervisor and those above; PROGRAMS SERVICES: Production Service: assistant to the chief of production and those above; Matane: assistant director of programs and those above; Quebec: chief of maintenance and film service, chief of coordination and distribution, programs administrative officer and those above.

SYNDICAT DES JOURNALISTES DE RADIO-CANADA (CSN) (SJRC)

(File 766-2055; 23/09/68)

The SJRC (as it is now known) was certified for employees employed at Montreal and Quebec City in the news broadcast service, classified as editor A, editor B, editor C, editor-national assignments, editor-Camera, editorial assistant, reporter A, reporter B, copy clerk D1, and copy clerk D.

(File 555-849; 17/04/78)

Later its certification was extended to all employees working in the News Service in Rimouski, Quebec, excluding chief info-news, and those above.

(File 530-843; 18/05/82)

The Board later modified the description of the unit so that the following positions be included: moderator, commentator, interviewer, reader, narrator, panellist and meteorologist (commentator), associated with news, current affairs and public affairs broadcasts; the position, in Montreal, of announcer on the aforementioned broadcasts; and the position of researcher/documentalist at the documentation centre of the Information Service in Montreal, with the exception of employees working on English-language programs who are represented by the Association of Canadian Television and Radio Artists (ACTRA).

(File 530-875; 26/10/82)

The Board again amended the order by deleting therefrom "researcher/documentalist at the documentation centre of" and by substituting therefor, "researcher and documentalist working for".

(Files 530-903, 530-910, and 530-1058; 24/03/86)

The CLRB amended the certification of the SJRC dated May 18, 1982 by including in the certified bargaining unit employees of the employer working in Chicoutimi, Sept-Iles and Matane, who perform the duties already described in the said order covering employees working in Montréal, Québec and Rimouski; it further amended the certificates held by the Canadian Wire Service Guild, Local 213 of the Newspaper Guild, in order to reflect the Board's decision in these matters (see our file 530-1350).

SYNDICAT GENERAL DU CINEMA ET DE LA TELEVISION (CSN)
(SGCT)

(File 766-1807; 26/09/66)

This group was certified to represent «les employés de service d'édifices, employés à Montréal (Qué.), classifiés comme premier concierge, concierge (homme), concierge (femme), et opérateur d'ascenseur, à l'exclusion du surveillant, département de l'entretien des édifices».

L'ASSOCIATION DES RÉALISATEURS DE RADIO-CANADA (ARRC)

(File 530-1548; 05/12/88)

Initially certified in 1981 (555-1409), the Union currently covers "all categories of television producers, including those on contract working for the Canadian Broadcasting Corporation in the following locations: - Montréal, Quebec - Québec, Quebec - Matane, Quebec - Rimouski, Quebec - Sept-Iles, Quebec - Moncton, New Brunswick" (530-712; 530-1548).

NATIONAL RADIO PRODUCERS' ASSOCIATION (NRPA)

(File 555-2008; 21/06/84)

All employees working outside of the province of Quebec employed as producers, including executive producers, associate producers, contract producers, and trainee producers.

ASSOCIATION OF TELEVISION PRODUCERS AND DIRECTORS (TORONTO) (ATPD)

(File 530-1230; 27/06/85)

The union certified in 1985 (555-2104) currently represents a unit composed of all employees working in television production in Toronto employed as television producers and directors, including executive producers, senior producers, associate producers, trainee producers and producer counsellors, whether on staff or on contract.

SYNDICAT DES TECHNICIENS DU RÉSEAU FRANÇAIS DE RADIO-CANADA (STRF)

(File 555-1023; 26/03/79)

All employees of the technical employment groups of the French Services Division of the Canadian Broadcasting Corporation, excluding those employees who belong to other bargaining units, and those employees who supervise employees of the technical employment groups of the French Services Division and those above, as follows: FRENCH TELEVISION: Technical Services: Maintenance Supervisor; Administrative Assistant, Equipment Goods; Supervisor,

Operations Centre and Cinerecording Labs; Supervisor, VTR Centre Office; Supervisor, VTR Operations Centre; Technical Supervisor; Technical Producer; Supervisor, Technical Equipment Centre and Vehicle Operations; Supervisor, Lighting; Supervisor, Special Projects; and those above; Film Services: Assistant Supervisor and those above; FRENCH RADIO: Technical Services: Supervisor, Outside Broadcasts; Supervisor, Stereo and Multi-track; Supervisor, Production Studios; Supervisor, Master Control Room and Monitor Rooms; Supervisor, Transmitter Studios, Editing and Presentation; Supervisor, Technical Maintenance; Supervisor, VTR Library; Supervisor, Recording and Duplicating; and those above; Regional Stations: Operations Manager - Rimouski; Operations Manager - Matane; Production Manager, (radio) - Maritimes; Technical Director, (television) - Maritimes; Manager, Technical Services - Maritimes; Technical Supervisor - Chicoutimi; Technical Supervisor, (radio) - Quebec City; Operations Manager, (television) - Quebec City; and those above.

UNITED STEELWORKERS OF AMERICA (USWA)

(File 555-2857; 05/01/89 and File 580-78; 27/09/89)

All security guards employed by the Canadian Broadcasting Corporation in the city of Ottawa, excluding security supervisor and those above.

BUILDING SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 204 (BSEIU)

That union holds two different certificates:

(File 766-738; 22/03/57)

- one for a unit of employees comprising building service employees classified as janitor and janitress employed in the respondent's Radio Division and Television Studios in Vancouver, B.C.;

(File 766-872; 08/05/58)

- and another one for employees employed in Toronto classified as janitor-in-charge, janitor (male or female) and janitor-watchman.

APPENDIX "B"

CURRENT VOLUNTARY RECOGNITIONS AT CBC AND RADIO-CANADA

* WHERE THE RECOGNITIONS WERE NOT SIGNED IN THE TWO OFFICIAL LANGUAGES, THIS DOCUMENTS ONLY USES THE OFFICIAL VERSION.

1. ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS (ACTRA)

IN RADIO

A. BROADCAST JOURNALISTS (RADIO)

SCOPE OF AGREEMENT:

"1.1 (a) The Corporation recognizes [ACTRA] as the exclusive collective bargaining agent for employees engaged on contract by the Corporation under this Agreement in connection with the preparation and production of all its English language programs or programs destined for an English speaking audience. Employees for whom minimum salaries and working conditions are governed by this Agreement are represented by the ACTRA Guild of Broadcast Journalists.

(b) This collective Agreement is the successor to the CBC/ACTRA Radio Writers and Radio Performers Agreements for the people contracted in the job categories in this Agreement who have been determined to be employees for the purpose of Revenue Canada, the Unemployment Insurance Commission, and/or the Canada Pension or Quebec Pension Plan. It is agreed that the application of the terms and conditions of this Agreement shall be restricted to these job categories -

- Writer/Broadcaster
- Researcher/Programmer
- Sportscaster
- Traffic Commentator
- Researcher
- Host
- Co-Host

...

1.5 This Agreement does not include a person employed by the Corporation and represented by another Bargaining Agent whose duties and functions include those of employees under this Agreement. ..."

B. RADIO WRITERS

"A101 The Corporation recognizes the Alliance of Canadian Cinema, Television and Radio Artists as the exclusive collective bargaining agent for all writers engaged by the Corporation in connection with the preparation and production of all its programs in the English language or

programs destined for an English-speaking audience.

A102 While this Agreement shall apply to all writers as defined herein, nothing in this Agreement shall be considered as preventing the Corporation from freely obtaining the services of a writer who may not be a member of ACTRA, provided that all the rates, terms and conditions of this Agreement shall [sic] apply to such a non-member writer.

A103 This Agreement does not include:

a) A person employed on a salary on a full-time basis by the Corporation whose regular duties and functions include writing, except that this exclusion shall not apply to such a person when that person writes a drama, a drama-documentary, a dramatization, an adaptation, a book show, a libretto.

b) A commentator who is not a member:

i) appearing on a regular or special radio newscast or program or program segment dealing exclusively with the discussion of the current news or with matters of current public concern, or on a fisheries or farm broadcast on radio;

ii) appearing on a radio broadcast as a critic or reviewer of the visual and performing arts or books or periodicals; or to comment on religion, education, hobbies, gardening or domestic arts; or having special knowledge in the arts and sciences, except that these exclusions shall not apply to such a commentator after nine (9) engagements.

c) An interviewer who is not a member appearing on a regular or special radio newscast or radio program or program segment dealing exclusively with the discussion of the current news or with matters of current public concern; or on a fisheries or farm broadcast on radio.

d) A person who is not a member and who is a recognized specialist who writes a non-dramatic script, the contents of which relate to that person's own special field, except that this exclusion shall not apply to any specialist after such specialist has written four (4) such scripts in any twelve (12) month period.

e) Any writer working within the jurisdiction of another bargaining agent which has an agreement with the Corporation.

A104 The Corporation agrees to protect the jurisdiction of writers under this Agreement by not giving any other union, association or collective bargaining agent jurisdiction over writers covered by this Agreement."

C. RADIO PERFORMERS

"ARTICLE 1

RECOGNITION AND APPLICATION

101 The Corporation recognizes the Alliance of Canadian Cinema, Television and Radio Artists as the sole bargaining agent for performers engaged by the Corporation for the production of its English-language programs or programs destined for an English-speaking audience.

102 This Agreement shall apply to all performers participating in radio productions, live or recorded by any means whatsoever for a broadcast over the facilities of the Corporation by direct transmission, land, wire, satellite or distribution by any other method. This includes the selling and distribution of such productions to other broadcasting outlets situated within and/or beyond the boundaries of Canada.

ARTICLE 2

TOTAL EXCLUSIONS

201 The following shall be totally excluded from the provisions of this Agreement.

a) Staff represented by another bargaining agent, except when performing as a principal actor, actor, singer, variety principal, or as a commercial announcer, having been specifically requested by name by an advertiser to deliver a program commercial or spot commercial.

b) A person performing as a musician, instrumentalist, self-accompanied vocalist, conductor of a band, chorus or choir, who is within the jurisdiction of the American Federation of Musicians.

c) A member of the public appearing incidentally as part of a public event or of a studio audience or as a participant in an open-line broadcast.

d) Persons holding or candidates for public office.

e) A participant in a broadcast of any religious service.

f) A student participating in an educational broadcast.

g) Persons (except teachers) appearing as themselves on a broadcast produced in co-operation with a school, college, university, or educational organization.

h) Children under sixteen (16) years of age appearing as themselves.

i) A member of the Armed Forces of Canada when appearing in any program primarily for the

purpose of describing military ceremony or for the purpose of recruitment, education or information relating to the Armed Forces.

j) Newscasters or any person heard on a newscast or in a news review.

k) Persons commenting, hosting, reporting or interviewing on programs about the news.

l) Persons commenting, reporting or interviewing on programs dealing with matters of current public concern and farm and fisheries broadcasts.

m) Interviewees.

The parties agree to review the cases of individual interviewees, the nature and frequency of whose appearances establish such interviewees as professional broadcasters. Where it is agreed by the parties that such an interviewee is a professional broadcaster, the terms of Clause 302 shall apply.

n) A contestant on any bona fide amateur, talent, or opportunity program.

o) A contestant participating in a quiz program or program game, provided that such a contestant is not rehearsed to develop an individual characterization.

p) Non-professionals appearing as part of local community affairs, historical re-enactments, county fairs and similar events on location, of which the Corporation is not the prime producer.

ARTICLE 3

QUALIFIED EXCLUSIONS

301 Non-professional performing groups from ethnic, religious, educational, cultural or philanthropic organizations not associated with any commercial enterprise and who are not operated for the profit of such organizations or of their individual members may be engaged up to two (2) occasions in any twelve (12) month period.

The Corporation and ACTRA agree that in the event the Corporation is desirous, in exceptional circumstances, of engaging a choral group or choir in excess of the two (2) occasions within a twelve (12) month period, the Corporation may seek such extension by applying in writing to the General Secretary of ACTRA on each occasion. ACTRA will consider such application and advise the Corporation of its decision.

302 The following categories shall be excluded as performers up to and including their ninth (9th) appearance on the air. On the tenth (10th) and any subsequent appearance, they shall be subject to the terms and conditions of this

Agreement and shall be deemed to be professional performers as understood in this Agreement:

- a) Panelists.
- b) Actuality commentators.
- c) Persons having special knowledge or authority in the arts and sciences, religious and educational affairs.
- d) Reporters and commentators appearing on local actuality and local special events.

ARTICLE 4

ACTRA MEMBERS IN EXCLUDED OR QUALIFIED EXCLUDED CATEGORIES

401 With the exception of Article 201 d) and i), when a member of ACTRA is engaged in any of the excluded categories, the conditions of this Agreement shall apply, and the member shall be paid not less than the rates of this Agreement. It is understood that any Corporation employee who happens to be a member of ACTRA but whose employment by the Corporation is in any of the excluded or qualified excluded categories shall not be eligible for payment. An ACTRA member may appear for promotional purposes without fee with the permission of the General Secretary of ACTRA or the General Secretary's designee. However, an ACTRA member's appearance in any of the excluded categories shall not require the qualification of other persons appearing in the same program in an excluded category."

IN TELEVISION

A. TELEVISION PERFORMERS

"RECOGNITION AND APPLICATION

101 The Corporation recognizes [ACTRA] as the sole bargaining agent of performers engaged by the Corporation for the production of all its English-language programs or programs destined for an English-speaking audience.

102 This Agreement shall apply to all performers participating in television programs produced live or recorded by any means whatsoever for broadcast over the facilities of the Corporation by direct transmission, land wire, satellite or distribution by syndication or by any other method. This includes the sale and distribution of such programs to other broadcasting outlets situated within and/or beyond the boundaries of Canada.

...

201 For the purpose of this Agreement, 'performers' means any person engaged by the Corporation to appear or to be heard on television, but specifically does not include:

a) a staff announcer, except when participating in a television program as an actor, singer, dancer, puppeteer, cartoonist, specialty or variety act, chorus performer, or a variety principal, or when delivering a commercial message within the span of a sponsored program;

b) a person performing as a musician, instrumentalist, self-accompanied vocalist, conductor of a band or a chorus or choir, who is within the jurisdiction of the American Federation of Musicians;

c) a member of the public appearing incidentally as part of a public event or as a member of a studio audience, providing such person does not receive individual coaching or direction;

d) a contestant participating in a quiz program or program game, provided that such contestant is not rehearsed to develop an individual characterization;

e) a person holding or a candidate for public office when participating in a program on political affairs;

f) a participant in a broadcast of any religious service;

g) an amateur athlete demonstrating or discussing any aspect of the sport in which such amateur athlete specializes;

h) a) a student participating in an educational broadcast;

b) persons (except teachers) appearing as themselves on a broadcast produced in co-operation with a school, college, university, or educational organization;

i) a contestant on any bona fide amateur talent opportunity program which involves competition out of which a winner is chosen on each program, provided that such contestant shall be limited to three (3) appearances as an amateur on any such series in any twelve (12) month period. The competitions referred to specifically do not include plays or operas but will include contestants, either individually or as groups, who present excerpts from plays or operas;

j) a member of the armed forces of Canada when appearing in any television program primarily for the purpose of displaying military ceremony or for the purpose of recruitment, education or information relating to the armed forces;

k) children under sixteen (16) years of ages appearing as themselves;

l) any person appearing in regular or special newscasts or programs or program segments dealing exclusively with the discussion of the current news;

m) a reporter, analyst or commentator when participating in programs or program segments dealing exclusively with matters of current public concern.

...

Qualified Exclusions

202 A person in any of the following categories may be engaged to appear up to four (4) times in any twelve (12) month period without being qualified, but on the fifth (5th) and following occasions shall become qualified by obtaining either work permits or membership:

a) an interviewee;

b) a person speaking or commenting with special knowledge of a topic by reason of that person's training or experience.

203 A dancing group, choir, or chorus of any ethnic, religious, military, educational, cultural or philanthropic organization not operated for the profit of its individual members may appear a maximum of two (2) occasions in any twelve (12) month period."

B. TELEVISION BROADCAST JOURNALISTS AND RESEARCHERS

"RECOGNITION AND APPLICATION:

1.1 (a) The Corporation recognizes [ACTRA] as the exclusive collective bargaining agent for employees engaged on contract by the Corporation under this Agreement in connection with the preparation and production of all its English language programs or programs destined for an English speaking audience.

(b) This Collective Agreement is the successor to the CBC/ACTRA Television Writers and Television Performers Agreements for the people contracted in the job categories in this Agreement who have been determined to be employees for the purpose of Revenue Canada, the Unemployment Insurance Commission, and/or the Canada Pension or Quebec Pension Plan. It is agreed that the application of the terms and conditions of this Agreement shall be restricted to these job categories -

- Writer/Broadcaster
- Researcher/Programmer
- Sportscaster
- Researcher"

C. TELEVISION WRITERS

"UNION SECURITY

A101 The Corporation recognizes [ACTRA] as the exclusive collective bargaining agent for all writers engaged by the Corporation in connection with the preparation and production of all its programs in the English language or

programs destined for an English-speaking audience.

...

A103 This Agreement does not include:

a) A person employed on a full-time basis by the Corporation whose regular duties and functions include writing, except that this exclusion shall not apply to such a person when that person writes a drama; a drama-documentary; a dramatization; an adaptation; a book show; a libretto.

b) A commentator who is not a member appearing on a regular or special television newscast or television program or program segment dealing exclusively with the discussion of the current news or with matters of current public concern.

c) A commentator who is not a member speaking or commentating with special knowledge of a particular topic by reason of training or experience, except that this exclusion shall not apply to any commentator after four (4) engagements in any twelve (12) month period.

d) A person who is not a member and who is a recognized specialist who writes a non-dramatic script, the contents of which relate to that person's own special field, except that this exclusion shall not apply to any specialist after writing four (4) such scripts in any twelve (12) month period.

e) Any writer working within the jurisdiction of another bargaining agent which has an agreement with the Corporation."

2. CANADIAN TELEVISION PRODUCERS AND DIRECTORS ASSOCIATION (CTPDA)

This group is composed of television producers working in the English Division outside of Toronto.

"ARTICLE 1

RECOGNITION AND JURISDICTION

1.1 The Corporation recognizes the Association as the exclusive representative of television Producers and Directors employed by the CBC in the following locations: Vancouver, Yellowknife, Edmonton, Winnipeg, Calgary, Saskatoon, Regina, Windsor, Ottawa, Halifax, Corner Brook, Charlottetown, Fredericton, Saint John, Goose Bay, Sydney, Labrador City and St. John's. Whenever the Corporation hires a Producer or Director in a new location and when mutually agreed to by the parties, they shall come under this Agreement, and the locations listed above shall be amended accordingly."

3. FOREIGN CORRESPONDENTS' ASSOCIATION (FCA)

The following would be a voluntary recognition covering foreign correspondents in both French and English networks.

"Introduction

Recognizing the common interests that link the Canadian Broadcasting Corporation and the Foreign Correspondents' Association, it is the intent and purpose of this Agreement to help promote close co-operation between the Corporation and its Foreign Correspondents while respecting the rights of both parties. It is the further intent of this Agreement to ensure that a spirit of cordial relations shall at all times prevail between the Corporation and its Foreign Correspondents. It is to these ends that this Agreement is signed in good faith by the two parties.

The parties recognize that the CBC Foreign Correspondents are employees of a publicly-owned corporation and, while retaining as citizens their full freedom of judgment and personal choice, they acknowledge that they cannot as journalists take sides in the performance of their duties.

The CBC's Foreign Correspondents must also perform their duties in accordance with the regulations and policies of the Corporation which are not incompatible with this Agreement.

...

Clause 1 - Status

(a) The CBC Foreign Correspondent in a foreign country must fulfill his duties in accordance with the information program requirements of the network (French or English) to which he belongs.

(b) Depending upon the various demands of news programming, the functions of the Foreign Correspondents include the gathering, writing, editing and presentation of oral, sound and/or visual reports for use in news and other programs broadcast by the Corporation."

4. UNION DES ARTISTES (UDA)

SCOPE OF AGREEMENT:

"2.1 This agreement covers any person engaged by the Corporation in one of the following classification or functions:

Host
Variety performer
Stuntman
Singer
Chorus leader
Group leader
Choreographer
Actor
Dancer

Host
Variety performer
Singer
Chorus leader
Group leader
Actor
Rehearsal Director
Understudy

Rehearsal Director	Stand-in
Understudy	Cueman
Illustrator	
Puppet handler	
Model	
Puppeteer	
Mime	
Stand-in	
Cueman	

2.2 Notwithstanding the foregoing article; this Agreement does not apply to:

- a) CBC employees, who by their profession or their status, participate in a program as a guest performer;
- b) guest performers who take part in a political program or who are interviewed in connection with a current event affecting them or any activity other than their artistic activity;
- c) chorus leaders acting as orchestra conductors;
- d) group leaders or choreographers who are not already members or trainee members of the Union;
- e) rehearsal directors who are not already members of the Union;
- f) a person who, in accordance with his occupation or status, takes part in a program as a demonstrator;
- g) amateurs or groups of amateurs taking part in an amateur show three times a year (from January 1 to December 31);
- h) amateurs and groups of amateurs, including choirs, who participate twice a year (from January 1 to December 31) in programs other than for amateurs (this exclusion, however, does not include drama programs);
- i) contestants selected from a radio audience or from the general public for participation in quiz programs or contests;
- j) persons taking part in events which are being reported or who appear incidentally in a studio audience;
- k) extras in film production shot more than eighty kilometres from headquarters;
- l) persons in film production following their ordinary occupation or profession at their usual place of work, provided they are subjected only to camera rehearsals.
- m) children less than sixteen (16) years old, unless they take a professional part in the program.

2.3 A staff announcers specifically retained by a sponsor to broadcast a commercial remains subject to this agreement.

2.4 A demonstrator who takes part in a commercial is subject to this agreement."

5. LA SOCIÉTÉ DES AUTEURS, RECHERCHISTES, DOCUMENTALISTES ET COMPOSITEURS (SARDEC)

That union holds two voluntary recognitions in the French Services Division.

A. RECHERCHISTES/DOCUMENTALISTES

"2.1 La présente s'applique à la personne que la Société engage à titre de documentaliste ou de recherchiste pour les fins définies au contrat individuel rédigé selon la formule appropriée apparaissant en annexe.

2.2 Nonobstant l'article 2.1, la présente ne s'applique en aucune circonstance:

a) au recherchiste et/ou au documentaliste engagés au service de l'Information de Montréal;

b) au rédacteur sportif;

c) à la personne, membre d'un syndicat ou non, à qui la Société confie un travail relié aux fonctions de recherchiste et/ou documentaliste dans une émission, telles que définies au Chapitre I, et qui agit dans cette émission comme animateur, commentateur, interviewer, conférencier ou exerce toute autre fonction au micro ou à l'écran;

d) à tout texte autre que ceux prévus à l'article 1.17

...

3.1 La Société reconnaît la SARDEC comme l'agent négociateur exclusif des recherchistes et des documentalistes qu'elle emploie."

B. AUTEURS

"2.1 La présente entente s'applique:

a) aux textes que la Société commande à un auteur pour des fins de diffusion dans ses émissions de langue française à la radio, à la télévision ou à Radio Canada International, et pour fins d'utilisation dans les marchés complémentaires tels que définis dans cette convention collective;

b) à l'auteur dont la Société retient les services professionnels à titre d'auteur-conseil, script-éditeur ou chargé de recherche;

c) à l'auteur qui fait la traduction anglaise de la version originale d'un texte français que la Société lui a déjà commandé.

2.2 Nonobstant l'article 2.1, la présente entente ne s'applique pas:

a) à tout employé régulier de la Société dont les fonctions comprennent exclusivement ou essentiellement la rédaction de textes;

b) à l'annonceur dans l'exercice habituel de ses fonctions;

c) au rédacteur de bulletins de nouvelles et/ou d'actualités et au reporter;

d) au spécialiste, sauf s'il est membre de la SARDEC, ou si la fréquence de sa collaboration fait de lui un auteur professionnel. Est réputé auteur professionnel le spécialiste à qui la Société commande un texte dans plus de quatre (4) émissions au cours d'une période de douze (12) mois;

e) au réalisateur qui, pour les besoins d'une émission ou d'une série d'émissions dont il a la responsabilité, écrit des textes prenant exclusivement la forme d'un schéma, d'un canevas, d'un enchaînement pour la radio (et à titre exceptionnel pour la télévision), du synopsis d'un documentaire ou d'une émission d'actualités, et en assure seul la rédaction;

f) au réalisateur qui pratique les coupures et fait les raccords qui rendent compréhensible, dans une émission dont il assure la réalisation, la diffusion d'un texte dramatique qui n'a pas été originellement conçu pour la radio ou la télévision;

g) au chercheur engagé à salaire, lorsque pour les besoins de l'émission ou de la série à laquelle il collabore, il écrit des textes qui prennent exclusivement la forme d'un enchaînement ou d'un commentaire;

h) aux textes que la Société achète ou qui sont tirés d'un répertoire dramatique ou littéraire;

i) aux textes commandés par un organisme international dont la Société fait partie;

j) aux textes que la Société diffuse, mais qu'elle n'a pas elle-même commandés;

k) sauf en ce qui concerne le tarif de la présente, à la traduction d'un texte anglais dont l'auteur est canadien, dont il fait la traduction lui-même et dont la Société a déjà fait l'achat en version originale;

l) aux oeuvres tombées dans le domaine public;

m) aux émissions scolaires;

n) au rédacteur sportif et/ou au chercheur/documentaliste du service de l'Information de Montréal lorsqu'ils rédigent des textes qui prennent exclusivement la forme d'un enchaînement, d'un commentaire, d'un documentaire, d'une traduction et d'un questionnaire.

...

3.1 La Société reconnaît la SARDEC comme agent négociateur des auteurs à qui elle commande des textes et/ou des services."

6. ASSOCIATION DES REALISATEURS DE LA RADIO (ARR)

"ARTICLE 1 APPLICATION

1.1 This Agreement applies to all categories of Radio producers including contract producers employed by the Corporation in the Montreal, Quebec City, Chicoutimi, Matane, Rimouski, Sept-Iles and Quebec Northern Service production centres of the Canadian Broadcasting Corporation, wherever they are assigned."

7. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA (IATSE)

A. NATIONAL ARTS CENTRE (OTTAWA) (IATSE LOCAL 471)

"1.1 This agreement shall apply to all persons supplied by the Union to perform the duties connected with the staging, properties, house audio system, and lighting of a CBC radio and/or television rehearsal and/or program at locations where the Union has an effective collective bargaining agreement in written form, which covers this jurisdiction."

B. TORONTO LOCATIONS (IATSE LOCAL 58)

"1.1 The Corporation agrees to use all those individuals who are members of the Union to perform the duties connected with the staging, properties and lighting of the CBC television rehearsal and/or program at locations where the Union has an effective collective bargaining agreement in written form which covers this jurisdiction, except as otherwise provided herein.

1.2 The Corporation is prepared to accept the jurisdiction of IATSE Local 58, in the following locations:

Royal Alexandra Theatre
O'Keefe Centre
Maple Leaf Gardens
Canadian National Exhibition
Massey Hall
Hart House Theatre

1.2.1 In addition, the Corporation will recognize the jurisdiction of the Union over an individual production on submission of a signed

contract that requires the use of members of the Union on the production, when such contract exists between the producer and the Union and/or between the producer and individual members of the Union.

1.2.2 The Corporation recognizes the jurisdiction of Local 58, IATSE, in premises where the Union has traditionally been employed, or where the Union has a prior agreement to work; and the Corporation agrees to employ members of Local 58, as required, except where prohibited by the Corporation's prior contractual obligations with its internal Unions when the Corporation uses such premises for TV or TV Film Production.

...

1.5 It is agreed that photographs, film and videotapes intended for news, sports publicity items and item for the promotion of public interest in a production will only involve individuals covered by this Agreement when their specific services are required by the nature of the work. The final items as presented for viewing by the public shall not be longer than two (2) minutes in length when such material is produced without the assistance of individuals covered by this Agreement."

8. THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AF of M)

A. RADIO

"This Agreement sets forth the terms and conditions under which the Canadian Broadcasting Corporation (hereinafter referred to as 'the Corporation') may engage musicians and other persons covered by this Agreement in certain phases of its operations which it acknowledges to be within the exclusive jurisdiction of the American Federation of Musicians of the United States and Canada (hereinafter referred to as 'AFM').

This Agreement applies to the Radio medium, including Radio Canada International, and relates only to broadcasting as it is presently known and to recording processes described herein as they are presently known."

B. TELEVISION

"This Agreement sets forth the terms and conditions under which the Canadian Broadcasting Corporation (hereinafter referred to as 'the Corporation') may engage musicians and other persons covered by this Agreement in certain phases of its operations which it acknowledges to be within the exclusive jurisdiction of the American Federation of Musicians of the United States and Canada (hereinafter referred to as 'AFM'),

This Agreement applies to the Television medium, and relates only to broadcasting as it is

presently known and to recording processes described herein as they are presently known."

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- 152

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Summary

CANWEST PACIFIC TELEVISION INC.
(CKVU); AND D. MACLACHLAN ET AL.,
APPLICANTS; AND NATIONAL ASSOCIATION
OF BROADCAST EMPLOYEES AND
TECHNICIANS, CERTIFIED BARGAINING
AGENT.

Board Files: 530-1886
530-1893

Decision No.: 847

Résumé de Décision

CANWEST PACIFIC TELEVISION INC.
(CKVU); ET D. MACLACHLAN ET AUTRES,
REQUÉRANTS; ET L'ASSOCIATION NATIONALE
DES EMPLOYÉS ET TECHNICIENS EN
RADIODIFFUSION, AGENT NÉGOCIATEUR
ACCREDITÉ.

Dossiers du Conseil: 530-1886
530-1893

N° de Décision: 847

These reasons deal with two
applications for review under section
18 of the Canada Labour Code (Part I -
Industrial Relations) which sought
reconsideration of a recent decision
of the Board.

Both applications were dismissed at
the screening stages of the Board's
review process as neither warranted
consideration by the full Board
sitting in plenary vis-à-vis errors
in law or of policy. Further, the
applications raised no new facts or
circumstances which were not
considered and dealt with by the
original panel.

In its reasons, the Board re-affirms
the onus carried by an applicant
seeking review of a Board decision to
establish serious grounds why the
decision should be reconsidered.

Les présents motifs traitent de deux
demandes de révision présentées en
vertu de l'article 18 du Code canadien
du travail (Partie I - Relations du
travail) et visant à obtenir le
réexamen d'une décision récemment
rendue par le Conseil.

Les deux demandes ont été rejetées à
l'étape de filtrage de la procédure
de révision du Conseil parce qu'elles
ne justifiaient pas un réexamen en
séance plénière à l'égard d'une erreur
de droit ou de principe. De plus, les
demandes ne soulevaient aucun fait ou
circonstance qui n'avait déjà été pris
en considération ou traité par le
groupe initial.

Dans ses motifs, le Conseil réaffirme
qu'il incombe au requérant qui demande
une révision d'une décision du Conseil
d'établir les motifs valables pour
lesquels la décision devrait être
réexaminée.



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Canada
Labour
Relations
Board
Conseil
canadien des
relations du
travail

Reasons for decision

CanWest Pacific Television
Inc. (CKVU),

and

D. MacLachlan et al.,

applicants;

and

National Association of
Broadcast Employees and
Technicians,

certified bargaining agent.

Board Files: 530-1886
530-1893

The Board was composed of Mr. J.F.W. Weatherill, Chair,
and Messrs. Hugh R. Jamieson and Thomas M. Eberlee,
Vice-Chairs.

Appearances (on record):

Mr. Kevin O'Neill, for the employer;

Mr. Stephen Schachter, for D. MacLachlan et al.; and

Mr. John Hodgins, for the certified bargaining agent.

The reasons for this decision were written by Vice-Chair
Hugh R. Jamieson.

These reasons deal with two applications under section
18 of the Code seeking a review and reconsideration of
the decision of the Board in CanWest Pacific Television
Inc. (CKVU), unreported decision no. 821 dated September
11, 1990 which we shall refer to as decision no. 821.

As background, decision no. 821 came about after the Board had heard an application under section 18 of the Code from the National Association of Broadcast Employees and Technicians (NABET or the union), in which the union had asked the Board to enlarge the scope of its bargaining unit at CKVU TV. CanWest Pacific Television Inc. (CanWest or the employer), the operator of CKVU TV, objected to any expansion of NABET's bargaining rights. Also, a group of employees who had previously been excluded from the bargaining unit and who stood to be swept into the unit, intervened and objected to NABET's application. Both the employer and the group of employees participated in a hearing before the Board and argued against NABET's application. Decision no. 821 reflects the rationale for the Board's inclusion of eleven additional employees in the bargaining unit at CKVU.

On October 4, 1990, CanWest and the same group of employees who were affected by decision no. 821, filed these two applications for review. The application by the employees, (Board file 530-1893) which was dated October 1, 1990 attacked the following two areas of decision no. 821:

- "1. The finding that the addition of my clients into the bargaining unit without obtaining their majority consent does not violate their rights under s.2d of the Charter.
2. The finding that the Board may use its review power to add employees to a bargaining unit without going through the normal certification procedure."

The other application (Board file 530-1886) was dated October 3, 1990 and it contained the following grounds which CanWest relied upon to upset decision no. 821:

- "(i) CKVU was denied a fair hearing resulting in a denial of natural justice in that it was not permitted by the Board to call certain evidence, which evidence was materially relevant. Such ruling of the Board is set out at pages 9-11 of the Decision;
- (ii) In any event, the Board erred in its interpretation of the Code and/or its policy in determining that the eleven positions are covered by the existing certification which errors include a complete failure to consider uncontradicted evidence, both oral and written, placed before the panel. This error also amounts to a denial of natural justice;
- (iii) The Board's determination of the intended scope of the 1979 certification was an error in interpretation of the Code and/or Board Policy."

In this application counsel for the employer also indicated support for the position taken by the employees in their application for review.

During the two months that followed the filing of the applications, CanWest and the employees filed further written submissions with the Board elaborating upon the positions they had taken in their applications. NABET filed its responses and these matters were then referred to this quorum of the Board which disposed of the applications on January 11, 1990. It should be noted that this panel was sitting in-camera as a "summit panel" as contemplated by the Board's internal review policies and procedures which have been described in British Columbia Telephone Company (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220); Wardair Canada (1975) Ltd. (1983), 53 di 184; and 84 CLLC 16,005 (CLRB no. 434); House of Commons et al. (1985), 62 di 225; and 85 CLLC 16,065 (CLRB no. 536); Brewster

Transport Company Limited (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580); and Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640).

One of the primary functions of a summit panel is to screen review applications which allege error in law or of policy where the applicant requests a review by the full Board sitting in plenary session (see Wardair Canada (1975) Ltd., supra). This internal avenue for review for serious errors in law and policy was initiated by the Board following the 1978 amendments to the Code which reduced the powers of the Federal Court of Appeal to review decisions of the Board (see British Columbia Telephone Company, supra). In the present cases, we have considered the arguments of the parties in the context of what the Board said in decision no. 821 and can find nothing which would warrant either of these applications being referred to the full Board.

Although CanWest's application is couched in language that infers errors in law and of policy, it is really limited to questions of natural justice and allegations that the original panel either ignored or misconstrued the evidence which the employer put before it. Certainly, there may be instances where the full Board would intervene to correct denials of natural justice, however, this is not one of those situations. Decision no. 821 deals with the appropriateness of a bargaining unit which is a question of fact, not law. The outcome of these determinations depend upon the particular facts of each case. The facts in this case were brought before the original panel by way of written submissions which were supplemented by viva voce evidence. The allegation by CanWest that the original panel somehow impaired its right to present all of its evidence on the

disputed issues by restricting the scope of the public hearing to specific areas that the panel wanted to hear does not, in our opinion, constitute a denial of natural justice.

How the facts are interpreted in any particular case is a matter for the panel that hears it. Any reconsideration application of such a decision must include facts or circumstances which were not before the Board at the time the decision was made. An explanation of when these facts came to the attention of the party seeking reconsideration must also accompany the application (see Employees of the Regional Comptroller (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41); and Pacific Western Airlines Ltd. (1983), 52 di 178; and 5 CLRBR (NS) 260 (CLRB no. 444)). We can see no new facts or issues in this application by CanWest which were not heard and dealt with by the original panel. CanWest is merely expressing its disagreement with the conclusions arrived at by the Board. This is not grounds for review. The application by the employer is dismissed accordingly.

The application from the employees raises some interesting questions about the status of the specific employees whom counsel claims to represent. None of the eleven employees that the Board included in NABET's bargaining unit has filed specific authorization for this application for review. NABET also reminded us in its submissions of November 23, 1990 that it came to light at the hearing into its original application that it was the employer, not the employees, who was actually paying counsel's bill. The original panel did not make this a big issue nor do we intend to. We would simply point out that it is collusion like this between dissident employees and employers that was partially instrumental in the Board adopting some of its policies for

dealing with applications for certification, i.e., public hearings only in exceptional cases, and the Board's preference for relying upon union membership cards as of the date of the filing of applications to satisfy itself of the wishes of the employees rather than conducting representation votes (see Sedpex Inc. (1985), 63 di 102 (CLRB no. 543) for a complete overview of the Board's policies in this regard).

As for the merit of the employees' application, the grounds upon which they rely do not require a review by the full Board. The Charter issue they raise was fully argued before the original panel and it was dealt with in decision no. 821. Counsel for the employees is now expressing his disagreement with the Board's decision. This is not proper ground for a referral of a question of law to the full Board. There must be something in an application which throws the interpretation applied by the original panel into serious doubt. This is not the case here. Counsel for the employees is simply re-arguing his case.

The other matter referred to by the employees, that the Board cannot use its review powers to add employees to a bargaining unit without obtaining the consent of the majority of those being added or without resorting to normal certification procedures, is totally unfounded. This topic has been explored by the Board on many occasions. We shall only refer to two cases: Canadian Pacific Limited (1984), 57 di 112; 8 CLRBR (NS) 378; and 84 CLLC 16,060 (CLRB no. 482); and Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661), where it has been clearly established that it is not the wishes of any particular group of employees in a bargaining unit that matters, it is the majority wish of all of the employees in the bargaining unit which the Board finds appropriate that

is determinative. In decision no. 821 the panel clearly turned its mind to the wishes of the employees in the bargaining unit and made its determination that NABET represented a majority in the bargaining unit. Also, it is well established that the Board can use its powers under section 18 of the Code to amend the description of a certified bargaining unit at any time. This issue deserves no further comment. This application for review, like CanWest's, brings nothing new to the Board that was not considered by the original panel. This being so, the application is dismissed.

Before closing, we would like to restate what was said by the Board in 1974 in the Employees of the Regional Comptroller, supra:

"The Code and the C.L.R.B. Regulations permit the filing of such an application for review asking the Board to reconsider an order or decision issued by it. Nevertheless, since section 122(1) (now section 22(1)) of the Canada Labour Code provides that orders or decisions of the Board are final, it must be up to the party filing such an application to establish to the satisfaction of the Board that its application is justified and that there exist serious grounds which warrant the setting aside of the original order and, in appropriate circumstances, the undertaking of a new investigation and the issuance of a new order or decision. The onus is thus on the applicant to satisfy the Board that the reviewing of the original order or decision is called for. The basis for such an application for review cannot be solely that a party disagrees or is otherwise dissatisfied with an order or decision of the Board." ...


(pages 26; 336; and 16,661; emphasis added)

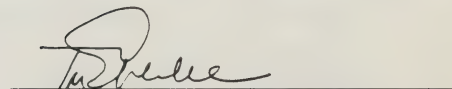
Nothing has changed since then to diminish the onus carried by an applicant for reconsideration to establish serious grounds why a decision ought to be reviewed. The finality of its decisions is of primary concern to the Board and reconsideration applications are screened by summit panels

with that in mind. Reconsideration of decisions is the exception rather than the rule and, unless there are new circumstances which warrant review, applications of this type will not proceed past the initial screening stage.

The foregoing is a unanimous decision.


J.F.W. Weatherill
Chair


Hugh R. Jamieson
Vice-Chair


Thomas M. Eberlee
Vice-Chair

DATED at Ottawa this 21st day of January, 1991.

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Summary

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- 152
STEPHEN VAN LUYK, SERGE LAVOIE, AND
BERNARD DELUCE, COMPLAINANTS;
CANADIAN AIR LINE PILOTS
ASSOCIATION, ROBERT J. YOUNG, KEVIN
A. HACKETT, GLEN A. LEACH, AND HUGH
T. RIDDELL, RESPONDENTS; AND AIR
ONTARIO INC., EMPLOYER.

Board Files: 745-2976
745-2978
745-2980

Decision No.: 848

Three persons complained to the Board that the Canadian Airline Pilots Association violated section 37 of the Canada Labour Code (Part I - Industrial Relations) when it refused to give them seniority credit for service as pilots with a previous airline when a new pilot seniority list was prepared following the merger of that airline and the one for which they were currently working.

The Board found no merit in their allegations and dismissed their complaints.

Résumé de Décision

STEPHEN VAN LUYK, SERGE LAVOIE ET
BERNARD DELUCE, PLAIGNANTS,
L'ASSOCIATION CANADIENNE DES
PILOTES DE LIGNES AÉRIENNES, ROBERT
J. YOUNG, KEVIN A. HACKETT, GLEN A.
LEACH ET HUGH T. RIDDELL, INTIMÉS,
AINSI QUE AIR ONTARIO INC.,
EMPLOYEUR.

Dossiers du Conseil: 745-2976
745-2978
745-2980

No de Décision: 848

Trois personnes se sont plaintes au Conseil que l'Association canadienne des pilotes de lignes aériennes avait enfreint l'article 37 du Code canadien du travail (Partie I - Relations du travail). Cette dernière a refusé de reconnaître leurs années d'ancienneté en tant que pilotes auprès d'une autre compagnie aérienne lorsque la nouvelle liste d'ancienneté a été dressée par suite de la fusion de cette compagnie aérienne et de celle pour laquelle les plaignants travaillent à l'heure actuelle.

Le Conseil a jugé que leurs allégations n'étaient pas fondées et a rejeté leurs plaintes.



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Reasons for decision

Stephen Van Luyk,
Serge Lavoie, and
Bernard Deluce,

complainants;

Canadian Air Line
Pilots Association,
Robert J. Young,
Kevin A. Hackett,
Glen A. Leach, and
Hugh T. Riddell,

respondents;

and

Air Ontario Inc.,
employer.

Board Files: 745-2976
745-2978
745-2980

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Members Linda M. Parsons and François Bastien.

Appearances:

Stephen Van Luyk, representing himself, accompanied by Anna
Lubojanska;

A.M. Heisey, for Serge Lavoie and Bernard Deluce; and
John T. Keenan and Lila Stermer, for Canadian Air Line
Pilots Association and the above-named individual
respondents.

The reasons for decision were written by Vice-Chairman
Eberlee.

I

The complainants in this case, Stephen Van Luyk, Serge
Lavoie and Bernard Deluce, are pilots employed by Air
Ontario Inc. The latter corporation was formed in the

spring of 1987 when Air Ontario Limited and Austin Airways were merged. The three complainants were listed on the Air Ontario Ltd. pilot seniority list at the time of the merger. Mr. Deluce was also listed on the Austin Airways list. When a new, merged seniority list for the pilots from the two companies was created, they were given their Air Ontario Ltd. seniority dates, but no credit for Austin Airways employment. They believe that they should have been credited on the new Air Ontario Inc. seniority list with time they also spent as Austin Airways pilots. The Canadian Air Line Pilots Association (C.A.L.P.A.) rejected this claim. The complainants allege that, by doing so, C.A.L.P.A. has failed in its "duty of fair representation" toward them and has violated section 37 of the Canada Labour Code (Part I -Industrial Relations). The Board heard the matter in Toronto on May 2, 3 and 4 and October 22, 23, 24 and 25, 1990.

II

Mr. Van Luyk was employed by Austin Airways as of August 1, 1983. In January, 1985, he applied for a pilot's position with Air Ontario Ltd. (The latter company was 50 per cent owned by Austin Airways, which in turn was controlled by the Deluce family.) He actually began working for Air Ontario Ltd. on June 1, 1985 and appeared on the pilot seniority list as of that date. Mr. Van Luyk told the Board that he has always considered his move to Air Ontario Ltd. had been in the nature of an "interdepartmental transfer" and that he was simply on a leave of absence from Austin. He did not appear on any Austin pilot seniority list after June 1, 1985. Nor did he ever challenge his Air Ontario Ltd. seniority date between June 1, 1985 and the merging of the Air Ontario Ltd. and Austin seniority lists in 1987 and 1988. The

evidence presented to us concerning Mr. Van Luyk's employment with, and relationship to, Austin leads us to conclude that it was not at all unreasonable for C.A.L.P.A. (having knowledge of these facts) to decide that Mr. Van Luyk severed his connection with Austin and did indeed become an Air Ontario Ltd. employee on June 1, 1985.

The situation of Serge Lavoie is perhaps somewhat more complicated. He began working for Austin in 1974. He went to work for Air Ontario Ltd. on or about September 24, 1984, which is his seniority date on that company's list. He testified that he thought he was actually on a leave of absence from Austin while he was working for Air Ontario Ltd. On the other hand, when he went back to work for Austin between April and October, 1986, he requested a leave of absence from Air Ontario Ltd. to be able to do so and his seniority with Air Ontario Ltd. continued to accrue. He remained in the Austin pension plan until February, 1987.

The Board was shown a record which indicated that Austin granted Mr. Lavoie a leave of absence commencing September 24, 1984, with no seniority at Austin to accrue and no base salary to be paid, but with group insurance and OHIP coverage to be maintained. A second record indicated that his employment with Austin, and these benefits, were terminated effective October 22, 1984 because he had gained employment with Air Ontario. While one witness - the former Austin payroll manager - testified that she considered Mr. Lavoie to have been on leave of absence from Austin while working for Air Ontario Ltd., another - a senior official of Air Ontario Inc. - told the Board he had no doubt that Mr. Lavoie had been officially terminated by Austin when he moved to Air Ontario Ltd.

While the Board is not called upon in a case of this kind to make any precise and definitive judgment as to Mr. Lavoie's status vis à vis Austin, we also conclude that it was not unreasonable of C.A.L.P.A., being aware of the foregoing facts, to have concluded that his employment relationship from the fall of 1984 onwards was with Air Ontario Ltd. and no longer with Austin.

Bernard Deluce's situation is even more complicated. He was on both the Austin and the Air Ontario Ltd. pilot seniority lists and on the payroll of both companies at the time of the merger. This was undoubtedly because he was a member of the family that controlled Austin and owned 50 per cent of Air Ontario. (The Board was told that, after the merger and the creation of Air Ontario Inc., Air Canada owned the majority interest in the new company. The Deluces retained a minority interest, although one of Bernard Deluce's brothers was the head of the operation.)

Mr. Deluce told the Board that he began working for Austin as a schoolboy during holidays and in the evenings. His first commercial flight was on August 16, 1982 and he flew for the company thereafter during his holidays and breaks from university, eventually becoming a full-time pilot. Early in 1985, his brother William, who was in charge of Austin, asked him to take on an assignment as an Air Ontario Ltd. pilot "to give them an operational view of how the company was being run". He began flying for Air Ontario Ltd. on May 30, 1985 and he reported to William on the state of affairs at Air Ontario Ltd. at least once a month.

When he started working for Air Ontario Ltd., he joined C.A.L.P.A. and began receiving the rate of pay established for a pilot in the Air Ontario Ltd. - C.A.L.P.A. collective

agreement. This was less than he was being paid at Austin, so he also remained on the Austin payroll and was provided a supplementary amount to bring him up to the Austin level. Although, he went on the Air Ontario Ltd. seniority list effective May 30, 1985, he also remained on the Austin list. He considered himself actually to be an Austin pilot on assignment to Air Ontario Ltd., although he did no flying for Austin and devoted himself entirely to Air Ontario Ltd. duties for almost two years prior to the merger.

III

In the spring of 1987, the two companies became one, as Air Ontario Inc. Up to that time Austin pilots had been non-union, while Air Ontario Ltd. pilots were represented by C.A.L.P.A. Thus, the pilot seniority list at Austin was basically management's list, while that at Air Ontario Ltd. could be said to bear the joint approval of the employer and the union. In July 1987, however, C.A.L.P.A. was certified to represent the Austin pilots.

Around this time, in accordance with C.A.L.P.A.'s rules, the president of the union gave notice to the new C.A.L.P.A. executive committee for the Austin pilots and to the executive committee for the Air Ontario Ltd. pilots that a merger had occurred and thus that a new, merged pilot seniority list would have to be prepared. (It scarcely needs to be said that the development of a merged seniority list is one of the most difficult and potentially most divisive exercises that a union has to undergo.)

Also in accordance with C.A.L.P.A. rules, each of the executive committees appointed representatives to a merger committee. At first the representatives for Austin and for

Air Ontario Ltd. worked separately to prepare accurate seniority lists for their respective groups of pilots. With the co-operation of management, they were able to consult company records. The Austin representatives prepared a list which included the name of Bernard Deluce but did not include the names of either Stephen Van Luyk or Serge Lavoie because they were not on the current Austin list. The Air Ontario Ltd. representatives prepared a list which included the names of these three gentlemen with their seniority dates for Air Ontario Ltd. that have been referred to earlier.

The Austin list was then sent in September, 1987 by the Austin representatives to those appearing on it, for either confirmation or correction. Mr. Deluce naturally did not challenge his listing; Messrs. Van Luyk and Lavoie did not receive it because they were not considered to be employees of Austin at that time and in any case were not named on it.

The Air Ontario Ltd. list was sent by the merger representatives for that group at roughly the same time to the pilots listed on it, also for confirmation or correction. Messrs. Deluce, Van Luyk and Lavoie were provided with copies. Mr. Van Luyk replied, indicating that he was dissatisfied, but neither Mr. Deluce nor Mr. Lavoie acknowledged the communication.

A couple of months later, Messrs. Van Luyk and Lavoie and two other Air Ontario Ltd. pilots engaged counsel who wrote to one of the members of the merger committee on their behalf and stated, among other things, "... my clients must have their seniority dating from the time they joined Austin Airways Limited and not Air Ontario Limited." Shortly thereafter, the member of the merger committee

replied, pointing out that C.A.L.P.A. policy requires that "the relative position of pilots on the current seniority list must be maintained in any integrated seniority list", thus rejecting their claim.

The Board is satisfied, from the evidence adduced at the hearing, that it is indeed C.A.L.P.A. policy in a seniority list merger situation not to take into account service with some other employer prior to employment with the current employer that is involved in the merger. There is no evidence that, in refusing to give Messrs. Van Luyk and Lavoie credit on the new, merged list for service with Austin, the union departed in any way from its established policy. Indeed, the evidence before the Board is that C.A.L.P.A. applied the same policy in the same way to several other Air Ontario Ltd. pilots who had also had service with Austin.

In January, 1988, the representatives of both groups effected the actual merger of the lists. Messrs. Van Luyk and Lavoie were listed with their Air Ontario Ltd. seniority dates. Consideration was given to the fact that Mr. Deluce appeared on both lists. The merger representatives had before them material from both Austin and Air Ontario company files. While Mr. Deluce appeared on the Austin seniority list and was apparently still on the Austin payroll, the material convinced them that he was not an active Austin pilot but was in fact, and had been for some time, an active Air Ontario Ltd. pilot. They therefore concluded that his Air Ontario Ltd. seniority date should properly be the one given to him on the new list, having regard to C.A.L.P.A.'s rules and policies.

The merged list was then made available to all pilots named on it. Before it could be implemented, however, it

had to be negotiated into the collective agreement. This was delayed because the parties had entered into negotiations for a first collective agreement between C.A.L.P.A. and the new Air Ontario Inc. Negotiations broke down, a strike commenced March 12, 1988 and did not end until May. A collective agreement was finally entered into, effective May 1, 1988; it incorporated the merged seniority list which had been finalized in January.

IV

The three complainants filed complaints with the Board early in August, 1988 alleging that the union's refusal to take into account their Austin service in establishing the new seniority list violated section 37 of the Code, which reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The Board scheduled the complaints to be heard beginning September 5, 1989 and then February 6, 1990, but at the request of the parties postponed the commencement of the hearing until May 2, 1990.

We have already indicated that we do not consider that C.A.L.P.A. acted unreasonably in coming to certain conclusions about the employment status of Messrs. Van Luyk, Lavoie and Deluce and in applying its policies and rules to their placement on the seniority list. However, there is a suggestion that Messrs. Lavoie and Deluce were viewed by C.A.L.P.A. during the 1988 strike and afterwards as "management spies" and as being "friends of management"

and that this influenced C.A.L.P.A. to make an adverse decision concerning their seniority dates.


Whatever may have gone on between these gentlemen and C.A.L.P.A.'s other members during the strike and subsequently, the fact is that the decision about their seniority was made by C.A.L.P.A. well before the strike began and was embodied in the January merged list. The only alteration in the list occurred later on in respect of the placement of certain employees who had been given too much seniority apparently by mistake. We see no connection between the placement of the three complainants on the list and any unfriendly perceptions or attitudes which may have developed towards them as a result of what they did or did not do during the strike.

Counsel for C.A.L.P.A. argued, among other things, that the matter complained of by the three gentlemen, namely their placement on the seniority list, was a provision of a collective agreement and not therefore something within the purview of section 37 of the Code. It is true that the Board has interpreted section 37 as not applying to the negotiation of a provision of a collective agreement but rather to the way in which a provision is applied or implemented. For example, when a union negotiates a provision of an agreement that sets up a different rate of pay for one classification of employee as against another classification, this has not been, and is unlikely to be, viewed as discriminatory per se, contrary to section 37. But if the union turns a blind eye to a situation in which an employee is being paid at a lesser rate than that specified in the collective agreement, as against what other similarly situated persons are getting, the chances are that this would be deemed by the Board to be "arbitrary, discriminatory or in bad faith", contrary to

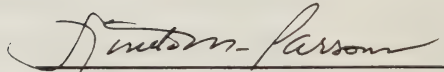
section 37.

It may be that counsel's argument is well taken. However, we have decided simply to note it, without accepting or rejecting it as being applicable in this particular situation, because we believe the three complaints are without merit on other, basic grounds.

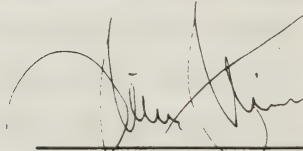
In summary, the Board is of the opinion that C.A.L.P.A. had the facts of the situation in front of it when it came to conclusions about the complainants' seniority dates. It did not interpret those facts unreasonably nor did it apply them unreasonably, in the light of its rules and policies. It turned its mind conscientiously to the issues involved in the placement of the three complainants on the seniority list. There is nothing in its conduct which leads the Board to be the slightest bit suspicious that it acted arbitrarily, discriminatorily or in bad faith. These complaints are therefore dismissed.



Thomas M. Eberlee
Vice-Chairman



Linda M. Parsons
Member of the Board



François Bastien
Member of the Board

Issued at Ottawa, this 8th day of February 1991

information

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211

132

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Summary

DOUGLAS B. CARTER AND ANTON
BICHLMEIER, ET AL COMPLAINANTS, AND
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1879, AND
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1654, RESPONDENT
UNIONS; MARITIME EMPLOYERS'
ASSOCIATION AND THE HAMILTON
HARBOUR COMMISSIONERS, RESPONDENT
EMPLOYERS.

Board Files: 745-3260
745-3261

Decision No.: 849

Résumé de Décision

DOUGLAS B. CARTER, ANTON BICHLMEIER
ET AUTRES, PLAIGNANTS,
L'ASSOCIATION INTERNATIONALE DES
DEBARDEURS, SECTIONS LOCALES 1879
ET 1654, SYNDICATS INTIMÉS, AINSI
QUE L'ASSOCIATION DES EMPLOYEURS
MARITIMES ET THE HAMILTON HARBOUR
COMMISSIONERS, EMPLOYEURS INTIMÉS.

Dossiers du Conseil: 745-3260
745-3261

No de Décision: 849

Certain persons who had worked as
casual longshoremen in the port of
Hamilton were refused further
employment by the Maritime
Employees Association and The
Hamilton Harbour Commissioners
after they, and others,
participated in a picket line which
resulted in the disruption of
waterfront activity in November
1988. The picketers claimed that
their purpose in establishing the
demonstration was to publicize
their long-standing demand for
membership in the International
Longshoremen's Association.

Most of those who were barred from
future employment, and several
other persons who were not, filed
complaints with the Board alleging
that the bar violated various
unfair labour practice provisions
of the Canada Labour Code (Part I -
Industrial Relations). They
alleged, as well, that the two
union locals of the I.L.A. in
Hamilton both supported, and failed
to challenge, the employment bar,
also in contravention of the Code.

The Board's hearing into the
complaints was spread over 16 days
beginning in late November, 1989,
and ending almost a year later.
Testimony was heard from many of
the complainants, as well as from
numerous other persons connected
with the matter. The complainants
were given "their day in court" to
the fullest extent possible.

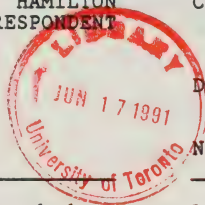
In the end, however, the Board had
to conclude that the actions of the
employers and of the union locals
were not in breach of the specific
terms of the Code. The complaints
were therefore dismissed.

L'Association des employeurs
maritimes et The Hamilton Harbour
Commissioners ont refusé de donner
du travail à certaines personnes
qui avaient travaillé comme
débardeurs occasionnels dans le
port de Hamilton après que celles-
ci et d'autres personnes eurent
participé à une grève qui avait
abouti à la perturbation des
activités sur les quais en novembre
1988. Les piqueteurs ont prétendu
qu'ils avaient organisé cette
manifestation pour rendre publique
une demande d'adhésion qu'ils
avaient présentée à l'Association
internationale des débardeurs il y
a longtemps.

La plupart des personnes à qui on
avait refusé de donner du travail
de même que d'autres personnes ont
déposé des plaintes auprès du
Conseil alléguant que ce refus
violait diverses dispositions
portant sur les pratiques déloyales
de travail figurant dans le Code
canadien du travail (Partie I -
Relations du travail). Ils
alléguaient en outre que les deux
sections locales de l'AID à
Hamilton appuyaient le refus et ne
tentaient pas de le contester, et
ce, en violation du Code.

L'audience du Conseil s'est
déroulée sur une période de 16
jours qui a débuté à la fin de
novembre 1989 et s'est terminée
presque un an plus tard. De
nombreux plaignants et autres
personnes intéressées ont témoigné
à l'audience. Les plaignants ont
eu la possibilité de faire
connaître leur point de vue.

A la fin, le Conseil devait
toutefois conclure que les mesures
prises par les employeurs et les
sections locales n'enfreignaient
pas les dispositions du Code. Les
plaintes ont donc été rejetées.



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Reasons for decision

Douglas B. Carter and
Anton Bichlmeier, et al

complainants,

and

International Longshoremen's
Association, Local 1879, and
International Longshoremen's
Association, Local 1654,

respondent unions;

Maritime Employers' Association
and The Hamilton Harbour
Commissioners,

respondent employers.

Board Files: 745-3260
745-3261

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Members Calvin B. Davis and Linda M. Parsons.

Appearances:

Timothy G.M. Hadwen, for the complainants;

Alan M. Minsky, for both locals of the International
Longshoremen's Association;

Gérard Rochon, for the Maritime Employers' Association; and
Bruce W. Binning for The Hamilton Harbour Commissioners.

These reasons for decision were written by Vice-Chairman
Eberlee.

I

This case is about the long-standing effort of certain
"casual" longshoremen to win membership in Local 1654 of
the International Longshoremen's Association, and what
happened to them after they picketed the roads leading into
the Port of Hamilton, and waterfront activity was shut down
in November, 1988. Although most of them returned to work

ately thereafter, some of them in early 1989 were refused and further employment by the employers in the port, The Maritime Employer's Association (MEA) and The Hamilton Harbour Commissioners (H.H.C.). The complainants allege that this violated various provisions of the Canada Labour Code (Part I - Industrial Relations). At the same time, they claim that the two union locals both supported, and failed to challenge, the employers' refusal to give further employment to them, also in contravention of the Code.

The Board listened to witnesses called by the various parties for 16 days - November 28, 30 and December 1, 1989; April 18, 19 and 20; May 14, 15, and 16; May 22, 23, 24 and 25, and September 4, 5 and 6, 1990. On one day, November 29, 1989, the Board had an unexpected, temporary lay-off as a result of the illness of one counsel. Then, two full days - September 12 and 13, 1990 were devoted to the arguments of the four counsel. The Board allowed itself to hear every scrap of evidence relating to the issues raised in the complaints; some of it was repeated on numerous occasions by different witnesses and some of it turned out to be irrelevant to the issues in the complaints, although highly relevant to the aggrieved individuals. However, the net result of the lengthy process is that the complainants should now be able to feel that they had "their day in court".

II

Although one of the products of so many days of testimony and argument is an exceptionally bulky file, the facts - as the Board finds them after sifting through all of that testimony - are reasonably straightforward. The Board, at least in respect of the main and relevant lines of the

story, was not often forced to choose between sharply conflicting accounts of what happened. The conflict arose largely over the interpretation of those facts: what was actually intended in respect of what somebody did, or how the Board should look at various significant actions by individual players.

For some time past there have been five stevedoring companies operating in the Port of Hamilton. These companies enter into contracts to load and unload ships engaged mainly in the transporting of cargoes to and from foreign ports. These stevedoring contractors are all represented for purposes of labour - management relations by the Maritime Employers' Association, an employers' organization with headquarters in Montreal. The MEA represents altogether some 80 firms which act as stevedoring contractors in various of the Canadian ports along the East Coast, St. Lawrence River and Great Lakes. The association bargains on behalf of its members operating in the Port of Hamilton and administers the resulting collective agreement.

Local 1654 of the I.L.A. is the union with which the M.E.A. deals in Hamilton. It is certified to represent all employees of member employers of the M.E.A. employed as longshoremen in the Port of Hamilton. In practice, this means that M.E.A. longshoremen do the work of unloading a ship and placing the cargo on the dock or in a warehouse or, vice versa, of loading a ship by taking cargo from a warehouse or a place of rest on the dock and stowing it in the vessel.

The Hamilton Harbour Commissioners are responsible for the functions of transferring cargoes, on the "landward side",

tween their resting places on the docks, or in rehouses, to and from railway cars or trucks. For the actual physical job of moving these cargoes to and from these locations, the H.H.C. also employs longshoremen under the jurisdiction of Local 1654 who are in such classifications as lift truck operators, freight handlers, coopers, shed sweepers, crane operators, signalmen and warehousemen.

The H.H.C. also employs members of Local 1879 to do what might generally be described as clerical and supervisory work, and equipment maintenance and repair work, via "dispatchers, expediters, lift truck mechanics, equipment dispatchers, customs checkers, all checkers, all foremen and all terminal office clerks" (collective agreement between H.H.C. and Locals 1879 and 1654, article 1.02). The H.H.C. has one collective agreement with both Locals for the work in the port over which it has responsibility.

To recapitulate, generally speaking the M.E.A. member contractors handle cargoes between ship and shore and have one collective agreement with Local 1654. The H.H.C. handles cargoes between shore and railway cars and/or trucks - work which is under the jurisdiction of Local 1654 - and looks after all clerical, supervisory and equipment repair and maintenance work, whether done on the MEA side of the line or on shore between the cargoes' place of rest and railway cars or trucks - work which is under the jurisdiction of Local 1879. The H.H.C. has one collective agreement covering these two general areas of activity and naming Locals 1654 and 1879 jointly as the union party.

Membership in Locals 1654 and 1879 has been, and still is, highly prized among the large group of persons who seek

longshoring and checking work in the Port of Hamilton. Pay has been reasonably good, and benefits and job security for those fortunate enough to hold union membership have been enviable, to say the least. Moreover, the work season is only about nine months in duration. During that period, a person who makes himself available for work (this is one occupation where, so far as the Board is aware, employees are all male) may earn what would equate to a reasonably good annual pay packet and then either do other non-port labouring work or go on unemployment insurance for three months. (We mention this not in disparagement of the persons involved but merely as a fact which obviously serves as an inducement to people to engage in this occupation).

Between the 1970's and 1987 and 1988, the number of active or potentially active members of Local 1654, the stevedoring local, dwindled down from around 85 to 44, only 28 of whom were actually available for work. The Board was told that only two new members were taken into the local between 1976 and 1988; these persons, in effect, inherited membership upon the deaths of their fathers who had been members of the local for many years.

The number of union members over the years was far from sufficient to meet the needs of the employers. Thus, in addition to the small group of union members who worked in the port, there developed a large body of persons who made themselves available to be selected for work as required. Indeed, in busy years like 1988, many of these "casual" stevedores worked just as long hours and just as regularly as the longshoremen who held the few union memberships available.

on membership gives a person significantly better benefits in employment than does "casual", non-union status, although the actual work by these two categories of longshoremen is usually the same. Union longshoremen and casuals receive the same hourly pay rates. However, the collective agreements for both M.E.A. employment and Hamilton Harbour Commission employment require the employees to remit a substantial sum (\$3.295) per man-hour worked by all persons employed, both union and non-union, to the ILA health and welfare trust fund to finance life and health insurance, weekly rate indemnity, pension and other fringe benefits for union members only. There are no benefits, beyond the basic pay for work done, provided to non-members. Needless to say, this system generates enough funds to support an enviable benefit package for the union members. The Board was also told of other perks enjoyed by union members: for example, Dofasco pays some kind of "royalty" to the union, which is divided among the union members; this is apparently in lieu of using ILA labour.

The employees have to pay 82 cents per hour - which is deducted from their wages by the employers - in lieu of paying union dues, simply for the privilege of obtaining work on the waterfront. Union dues, on the other hand are \$240 per year.

There is no need for us to describe in minute detail the complexities involved in persons being assigned to or selected for work, at least during the period up to 1988. Generally speaking, for M.E.A. stevedoring contractors, at the start of each shipping year, foremen were selected to supervise gangs. (All foremen have to be union members as well). The foremen then chose the members of their gangs

from among the union membership. These gangs would go to work if, as and when stevedoring contractors required their services to load or unload ships in the harbour.

The Board understands that while the union men would know in advance of a shift whether their services were required, the system for the casuals - at least until 1988 - was that they would congregate at the union hiring hall prior to each shift and would be hired at random by foremen who needed personnel for their gangs. Since there were so few active union members, the gangs were almost invariably short-handed and had to be filled out with "casual" personnel. The story told to the Board was that perhaps 50 or 60 casual people managed to win the nod regularly from the foremen and be employed almost on a full-time basis during the shipping season. Some of the complainants testified that they were in this category. The pay and time records filed with the Board show that, in the years from 1984 to 1988, the total number of individuals employed as casuals in each shipping season ranged from almost 200 in 1984 to over 500 in 1988. However, as we have indicated there was a small core of individuals in each year - and usually the same persons - who worked virtually the same number of hours as union members.

Not surprisingly, this group of casuals felt for many years that they should be taken into regular membership in the union. A number of factors came into play in 1987 and early 1988 to force both the M.E.A. and the union to consider reforming the system. One such factor was the passage by Parliament of the "Employment Equity Act" which imposed upon employers certain new responsibilities to ensure fairness in employing persons. Another and possibly major factor working on the union was the public campaign

wage by the casual people to have the situation changed.

It was agreed by the M.E.A. and the union in the negotiations for a new collective agreement in 1987 that the M.E.A. would become responsible for hiring new employees; however, the M.E.A. undertook - "to the extent its legal obligations may be met..." - to consider only those candidates for employment who were referred by the union. A memorandum of agreement including this and other related matters was signed in July, 1987; it was not incorporated into actual collective agreement language and officially signed by the parties until July, 1988.

Meanwhile, early in 1988, the union established a special committee to develop a new employment referral system. The agitation by the group of casuals for union membership continued during this period.

The initial approach worked out between the M.E.A. and Local 1654 of the I.L.A. was that the union would create a "back-up" or "reserve" pool of non-union persons who would be selected from the casual group, subject to M.E.A. approval, and would be available for assignment to work in the port after union members had been dispatched but before others with a lesser attachment to the port were given work. At the beginning of November, 1988, the union's employment referral committee presented the union membership with a draft of a comprehensive package of rules governing the referral of persons to work. Among other things, this package provided for the establishment of an "A" Reserve Pool and a "B" Reserve Pool consisting of 20 persons each who would be dispatched for employment in their order of seniority after union members had been dispatched but prior to the dispatch of other non-union

persons who would be known as "Bullpen Members". The package of rules provided that persons would have to apply for reserve pool membership; they would be selected with the approval of the union, the M.E.A. and any other employer with which the ILA Local 1654 had a collective agreement. The first name on the "A" pool would be the person who had worked the greatest number of hours in the port from January 1, 1984 to August 27, 1988. The other 19 persons selected would be listed after him in the order of their particular hours worked. The 20 "B" pool people would then be listed from next highest hours worked down to lowest.

The first person on the "A" list - the person with the most hours worked in the 1984-to-1988-period would have the first opportunity to become a union member when a vacancy opened up in the union membership. Every three months such vacancies, if they existed, would be filled.

Whenever somebody moved from the top of the "A" list into union membership, the people on the "A" list would move up and the appropriate number of people from the top spots on the "B" list would take their places. Then the "B" list would be filled out by recruitment from the "Bullpen" group.

The union's membership approved this scheme, but the leaders of the casual group opposed it. Apparently they felt it had several drawbacks: it did not take enough people into union membership quickly enough, since the present numbers in the union were to be frozen and openings would only come about by attrition; it did not offer any time credit for people who suffered industrial accidents, went on workers' compensation and lost hours of work

ereby. There were other objections as well, but the sake of brevity, we shall not catalogue them.

A group of the casual people decided to protest the situation, first, by not making themselves available for work and then, by way of a picket line which they established on November 18, 1988. This effectively cut off the flow of freight in and out of the waterfront area. The Board was told that this blockage of activity in the harbour was particularly troublesome because the end-of-season rush was under way to clear the port and the Great Lakes before the Seaway closed around Christmas time.

Robert Lacroix, Executive Vice-President of the Maritime Employers' Association, travelled quickly to Hamilton to see what could be done to resolve the problem after he had received telephone calls from employers and from Rick Kelly, one of the casual labourers who was involved in the demonstration. Mr. Lacroix testified that Mr. Kelly told him the men were particularly angry that the scheme just approved by the union did not provide for them to become union members quickly enough. Mr. Kelly invited Mr. Lacroix to assist them in finding a solution.

Mr. Lacroix then consulted the union and obtained the agreement of the union officers to address the following letter to Mr. Kelly to be communicated to the picketers:

" Mr. Rick Kelly
376 Catharine Street North
Hamilton, Ontario

Dear Mr. Kelly:

Further to our discussions with respect to settling the current dispute affecting longshoring operations in the Port of Hamilton, this will confirm our undertaking:

- 1) Forty (40) employees who currently are non-union will be taken into the membership ranks of ILA Local 1654 in accordance with the provision of

the current collective agreement;

- 2) The method of selection to be used to identify the forty (40) individuals must be fair, equitable, and non-discriminatory and meet with the approval of the Canada Labour Relations Board or its representative;
- 3) The process referred to in items 1 and 2 above shall be completed in time to ensure that the forty (40) individuals are taken into the membership ranks of ILA Local 1654 in time for the opening of the 1989 season in the Port of Hamilton;
- 4) The existing union members shall as a group, be recognized as "senior" and in recognition of this seniority shall have first preference of employment
- 5) All picketing and demonstrating and/or any and all other forms of disruption withdrawal of services (complete or partial) by non-union individuals shall cease by 1500 hours on November 19, 1988
- 6) All non-union employees shall as of 0800 hours on November 20, 1988, return to the normal procedures with respect to indicating their availability for and seeking for work.

We trust this resolves the matter.

Sincerely,

(signed)

Robert Lacroix
Vice-President
Maritime Employers Association"

(sic)

During the afternoon of November 19, 1988, Mr. Lacroix presented the letter and discussed it with Mr. Kelly and other picketers. They then withdrew to consider their position and some time later presented him with a handwritten document signed by seven of them who described themselves as "Committee Members":

- "- When meeting with labour board concerning who 40 members will be, we would want our representatives present at all times at meetings to voice opinions.
- Will the senior union be able to double book. (E.G.) rain time, shed time, seaway.
- Would a senior union man be able to bump a junior union man in a long gang, that was already in that position.

The problem with check-off is too much is taken off a non-union member to work, than a union member to work, than a union member. We as the committee feel that in the future check-off should not be greater than union dues. Which will avoid future problems.

- Because of past problems we would like to have approval by the representatives of 40 individuals who will be taken into the membership ranks of I.L.A. Local '1654'
- We feel that instead of one name on contract we would like a committee to be reconsidered.
- We would like the union to maintain 84 union members at all times
- Will we have voting rights or will there be a years probation
- Will there be a fair system set up for these non-union members

Committee Members

(signatures)"

(sic)

Attached to the document was a list of 40 names; the picketers told Mr. Lacroix that these were the persons they felt should be taken into the union immediately. It was later brought to Mr. Lacroix' attention that one of the names on the list was that of a gentleman who was then serving a penitentiary term for manslaughter. Mr. Lacroix told the picketers that their proposal would not be acceptable; they were not going to be able to dictate to the union who the new members would be. After much discussion between them, the picketers had not accepted the Lacroix proposals and persisted in their demand that the names of the 40 union members be determined immediately. Mr. Lacroix concluded that no agreement was possible at that point. Indeed, by late Saturday, November 19, he felt that the situation was becoming "ugly"; people were becoming intimidated; he was personally threatened with violence; the picketers had

succeeded in halting the port operation.

On Monday, November 21, the MEA, Local 1654 of I.L.A. and the Hamilton Harbour Commissioners obtained an interim injunction from the Supreme Court of Ontario requiring some 30 named individuals to withdraw the picket line and to cease their effort to blockade the port. Although the individuals named were served with the interim injunction, they did not contest the application to the court and the injunction was made permanent on November 30, 1988.

The Board heard considerable testimony from a number of the complainants and others who had participated in the picket, including some who had signed the picketers' reply to Mr. Lacroix' letter, as to the reasons why the Lacroix letter was not acceptable to them and why they advanced counter proposals and a list of names. These reasons were numerous: for example, the Lacroix letter should have been addressed to the whole group and not just to Mr. Kelly; they wouldn't agree to it because Mark Fortman, the president of Local 1654, had not signed it; they didn't trust the union to go through with the deal; they knew who should become union members and this should have been done immediately; the union didn't tell them who it felt should be the 40 new union members and they wouldn't agree to anything until they knew who the union had in mind. Witnesses appearing on behalf of the complainants sought to have the Board believe that their list of 40 names had been advanced only as a bargaining position and that they were far from being adamant that these were the persons who had to go into the union first.

In any case, the Board does not have to determine how honest or realistic, or anything else for that matter, are

he picketers' subsequent rationalizations for their rejection of the Lacroix proposal. It does appear to the Board, however, as an unbiased observer, that when Mr. Lacroix gave them his letter setting out a "due process" approach to getting 40 of them into the union, they had in their hands just about all they could reasonably expect to obtain and by rejecting it and persisting in their picketing activity they blew away their own chances.

As soon as the injunction was served on members of the picketing group on November 21, they dispersed. Two or three days later, they began making themselves available for work again and were hired as usual to fill out the gangs and do other jobs as required. Some of the witnesses for the complainants testified that they were assured by Mr. Lacroix and others that they would suffer no "reprisals" as a result of the picket; this was denied by Mr. Lacroix. Whether such assurances were or were not given seems to the Board to be irrelevant. The fact is that operations and employment in the port returned to the pre-picket situation without further incident until the seasonal shut-down at Christmas.

Mr. Lacroix and witnesses for the ILA testified that the employment referral scheme which had been approved by the union membership at the beginning of November, and which was the apparent triggering mechanism for the picketing blow-up, was withdrawn pending further study. Mr. Lacroix told the Board that the M.E.A. felt it was obvious a back-up or reserve pool would have to be established and the work referral system in Hamilton would have to be regularized. So far, the plan to let the union solve the problem had not worked. Hence, during the seasonal lay-off, the employers would have to take the lead in setting

up something appropriate.

On November 28, 1988, Mr. Lacroix wrote the following letter to the president of Local 1654:

"Mr. Mark Fortman
President
I.L.A. Local 1654
Foot of Ferguson Ave. North
Suite 109
Hamilton, ONT.
L8L 4Z9

Subject: Hiring new employees

Dear Sir:

Following the recent events wherein the normal operations of the Port were interrupted as a result of our inability to obtain adequate back-up labour, please be advised that it is our intention to proceed during the off season to hire new employees in order to create a recognized formal back-up labour pool and have it in place prior to the start of the 1989 season.

In this regard, we refer you to the Memorandum of Agreement signed July 29th, 1988 wherein the parties recognized that the employer is responsible for such hiring. We will be in touch with you in the near future in order to schedule a meeting with you at which time procedural details will be clarified. In the mean time, we recommend that I.L.A. Local 1654 consider a parallel process through which new employees may gain access to Union membership.

Yours very truly,

(signed)

*Robert L. Lacroix,
Vice-President"*

(sic)

Under the terms of article 3.13(b) of the collective agreement, Local 1654 referred to the employers (the M.E.A.) as candidates for hiring as new employees in the back-up pool all the persons who were listed as having worked between 1984 and 1988 as casuals in the Port of Hamilton.

It was decided that the back-up pool would consist of an "A" and a "B" group, with 30 persons in each group. The

ess of selecting the requisite 60 out of a list of over
involved several steps: a decision was taken to
consider only those with more than 200 hours of service in
the year 1988. This greatly reduced the number of
potential candidates. It was also decided that persons who
were regularly employed as checkers under Local 1879
auspices would not be eligible for the reserve pool.

Between November, 1988 and February, 1989, the M.E.A., with
Mr. Lacroix taking responsibility for the process,
identified those it believed had played leading roles in
the November disruption. On February 8, 1989, some 19
persons - a number of whom are complainants in this case -
received the following letter from Mr. Lacroix:

"Dear Sir:

*On November 18th through 21, a group of individuals,
in which you were included, set-up an illegitimate
picket-line and illegally interrupted the normal
longshoring activities in the Port of Hamilton. In
order to effect a return to normal operations in the
Port, we were forced to seek legal recourse through the
courts in the form of a cease and desist injunction.*

*This event caused serious material damage to the Port
and those individuals and companies who rely on it
either directly or indirectly. Furthermore, concern
over labour instability is potentially devastating to
a port. It can result in long term or even permanent
loss of business in addition to the immediate damages
caused.*

*We have now completed our internal deliberations over
these events, including the determination of the course
of action we must take to ensure that the labour force
in the Port of Hamilton is such that stability is
assured and the viability of the port not be threatened
by such irresponsible activity in future.*

*As a result of your role in leading and maintaining the
illegal interruption of normal longshoring activities
in the Port of Hamilton, we are hereby advising you,
on behalf of our member companies, that you will no
longer be accepted for employment in the Port of
Hamilton. Furthermore, we are advised by the Hamilton
Harbour Commission that they subscribe to this course
of action and that they also will no longer accept you
for employment within their operations in the Port of
Hamilton.*

*Consequently, by copy of this letter we are informing
L.A. Local 1654 that you are no longer to be referred*

by them for employment in longshoring work at the Port of Hamilton.

Yours very truly,

(signed)

*Robert L. Lacroix,
Exec. Vice-President"*

(sic)

Later on, two of the letters were withdrawn when the individuals who had received them convinced Mr. Lacroix that they had not been involved in the affair.

The Board is satisfied on the basis of the evidence before it that the decision to bar 17 persons from employment in the port was and is the sole responsibility of the M.E.A. and was concurred in by the Hamilton Harbour Commissioners. Obviously, the union was and is not displeased with the result, but it does not share responsibility for the actual bar.

In the end, some 94 persons were considered to have the basic hours of service qualifications for the 60 positions in the back-up or reserve pool. They were sent the following letter, to which was attached a three-page application form and questionnaire:

"Dear Sir:

Pursuant to the Collective Agreement concluded between ourselves and I.L.A. Local 1654 in 1988, we are now undertaking to create a formal reserve labour pool of approximately 60 individuals in order to ensure a more stable labour force for the Port of Hamilton. It is our intention that this reserve labour pool be in place by the opening of the 1989 season in early April or as soon as possible thereafter.

The individuals who make up this reserve labour pool shall have priority to be dispatched by Local 1654 for employment by our member companies and the Hamilton Harbour Commission, immediately after the available members of the Union. Furthermore, future members of I.L.A. Local 1654 shall come from our reserve labour pool.

We will be interviewing candidates for the reserve labour pool on March 16, 17, 20, 21, 22 and 23 at Centennial Terminal and, we reserve the right to require a medical evaluation of anyone who may eventually be a candidate for training.

In this regard, we are enclosing an application form which you must complete, if you wish to be considered for inclusion in the reserve labour pool.

On the assumption that you are interested in being considered for our reserve labour pool, we are taking the liberty of scheduling an interview appointment for you on _____

You must return the completed application form to us prior to the interview or bring it with you.

Please advise us or your local if you require information or if you do not wish to be a candidate for the reserve pool.

Yours very truly,

(signed)

Robert L. Lacroix
Executive Vice-President"

(sic)

Mr. Lacroix testified that about 80 out of the 94 actually showed up for interviews. These were carried by a team of persons representing the M.E.A. and the H.H.C., with an observer representing the union. During the course of the interviews, complainants Rick Kelly and Harry Staats withdrew their applications. Mr. Lacroix told the Board that they objected to the method being used to select pool members. In the end, out of 78 applicants, 60 were selected.

During this same time frame, the union implemented a work referral system of which the back-up or reserve pool was a key part. It took the names of the 60 persons who had been selected by the MEA and listed them on the "A" and "B" sections of the pool in the order based on the hours they had worked in 1988 from the most to the least. Beginning in April, 1989, the union then took into membership a few

of the senior-most people on the "A" list as union membership vacancies were identified. Except for the 17 persons barred, all the others not selected for the reserve pool continued to have the right to bid for casual work in the port as members of the so-called "bullpen".

The barring of the 17 persons as of February 8, 1989 is the event which brought forth eventually all of the allegations against the two employers and the two unions. The questions to be determined by the Board may be summarized as follows:

- Did the Maritime Employers' Association and the Hamilton Harbour Commissioners violate sections 94(3)(a)(i), 94(3)(e) and 96 of the code when they decided that the 17 persons would not henceforth be hired to work as longshoremen in the Port of Hamilton?
- Did the Maritime Employers' Association and the Hamilton Harbour Commissioners violate section 94(1)(a) through their involvement in the establishment and implementation of the work referral system, including the back-up or reserve pool?
- Did the unions - locals 1654 and 1879 - violate section 96 through their alleged involvement in and support for the barring of the 17 from employment?
- Did the two unions violate section 37 of the code by their failure to file and carry forward grievances under the collective agreements with M.E.A. and H.H.C. on behalf of 17 persons who were

denied further or future employment?

The applicable sections of the Code read as follows:

"94.(1)(a) No employer or person acting on behalf of an employer shall participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or
...

94.(3)(a)(i) No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,
...

94.(3)(e) No employer or person acting on behalf of an employer shall seek, by intimidation, threat of dismissal or any kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;
...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The complainants in File 745-3261 also alleged that the union had violated section 69(2). This section reads as

follows:

"69.(2) Where, pursuant to a collective agreement, a trade union is engaged in the referral of persons to employment, it shall establish rules for the purpose of making such referrals and apply those rules fairly and without discrimination."

It was agreed during the course of the hearing that this aspect of the complaint would be held in abeyance pending the Board's decision on the other alleged violations. Considerable evidence was adduced relating to the matter but presumably not all that the complainants might have wished to bring forward. In any case, the Board has not reported that evidence in these reasons.

III

Nothing in the evidence before the Board causes us to suspect that the 17 persons were barred from employment by the M.E.A. and the Hamilton Harbour Commissioners because they sought membership in Local 1654 of the I.L.A. The evidence is overwhelming that they were refused employment only for the reasons set out in the February 8, 1989 letter which has been quoted on page 16.

It is true that they and other non-union colleagues had long wanted to be taken into the union, that they had agitated on several occasions over a period of years for what they felt was their just due and that they finally established a picket line on November 18, 1988 in an effort to force their way into the union. The initial reaction of the employers to this activity was to try to resolve the problem and thus obtain the removal of the picket line and a resumption of the operation of the Port of Hamilton.

employers, in the person of Mr. Lacroix, took on the role of mediator and persuaded the union officers to agree to a plan (quoted on page 10 in Mr. Lacroix' letter) which outlined the principles of a method of bringing 40 persons into the union.

The picketers responded with a series of questions and caveats plus a list of 40 people they wanted taken into the union. Although some of them later told the Board that the list was advanced simply as a negotiating position (to get the union to reveal who it had in mind), the evidence shows that this was far from clear to Mr. Lacroix and the union officers at the time. Not surprisingly, their reaction was that they weren't going to be told by the picketers who the new union members would be. Indeed, the evidence suggests that Mr. Lacroix rejected the picketers' proposition because to implement it might have actually been contrary to the Code. The attempt by the employers to mediate an end to the dispute failed, the picketing continued and was only ended on November 21, 1988, when the Supreme Court agreed to the joint application of the M.E.A., H.H.C. and I.L.A. for an injunction.

During the following weeks, the M.E.A., H.H.C. and I.L.A. moved to implement the terms of the collective agreement providing for a reformed referral system, including the establishment of the new reserve or back-up pool. In accordance with the collective agreement, the I.L.A. had the right to nominate persons for the reserve pool and for employment by the M.E.A. and H.H.C. Local 1654 referred the entire list of persons who had recently worked as casual longshoremen in the port, including the 17. The evidence shows that the M.E.A., supported by the H.H.C., decided not to employ the 17 because they had, in the view

of the M.E.A. and H.H.C., led the November disruption and were troublemakers. There is nothing in the evidence to suggest they were denied employment because of any union activity that section 94 was designed to protect. Indeed, it is clear that their activity was really directed against the union in order to force the union to open up its membership doors. This is not what section 94(3)(a)(i) or 94(3)(e) are all about. These provisions contemplate situations in which employers act out of "anti-union animus". Employers who refuse to hire people because of "anti-union animus" are usually attempting, for example, to weaken a union or are trying to keep their workplace from being infiltrated by union advocates. There is no evidence at all to make the Board the slightest bit suspicious that anti-union animus was present in the motivation of the M.E.A. and the H.H.C. in barring these people from employment. The reasons why the 17 were barred are not prohibited by section 94 of the Code.

The same analysis applies to the allegation that the employers have violated section 96.

The complainants claim that the M.E.A. interfered with the administration of the union, contrary to section 94(1)(a) of the Code in that it had an involvement in the establishment and implementation of the new employment referral system. There is no evidence to support the contention that the M.E.A.'s involvement violated the Code.

Prior to November, 1988, there existed only a highly questionable system for selecting and assigning persons to employment as longshoremen, although the memorandum of agreement of July, 1987, which was actually translated into collective agreement language in July, 1988, provided for

much-needed reforms. The role played by the M.E.A., as a party to the collective agreement, in introducing the new scheme into the agreement, cannot be viewed in any way as violating the Code's provision against interference in a union's administration. In fact, it is not dissimilar to the kind of role the M.E.A. has played in virtually every port where it has a relationship with I.L.A. locals and is completely legitimate.

At first, the M.E.A. left it to the union to implement the first stages of the system. Then, after the November, 1988 protest by the casual personnel, the M.E.A. assumed more of a lead role. This resulted in the actual establishment of the reserve pool and the recruitment of individuals to fill it. As far as the Board can see, the whole exercise was accomplished with the co-operation of the union and in accordance with the general terms of the collective agreement. The M.E.A.'s involvement here was never perceived by the union as being an illegal interference in its affairs. The decision to refuse employment to certain people was the M.E.A.'s to make since the union conceded to it the right under the collective agreement to choose employees for the reserve pool. The union established the seniority system and list for the persons recruited into the reserve pool. There is no evidence that the employer played any part in the subsequent taking into union membership of any persons from the pool. Its only involvement in the union issue was to try in November to mediate the dispute between local 1654 and the picketing casuals.

Since the employers' decisions and actions vis à vis the 17 did not violate the Code, the two unions cannot be said to have breached it in respect of their connection, if any,

with the barring of these persons. Indeed, there is no evidence that the two union locals participated, or were involved, in any way in the employers' decision not to hire the 17. It appears that they were simply passive observers, although they were not at all unhappy about what happened to the 17 because they felt they had been unfairly treated by the casuals through the picket line episode.

IV

The complainants argue that the union breached its duty of fair representation and violated section 37 when it failed to file grievances on behalf of some or all of the persons who were denied employment.

ILA officers offered a number of reasons to explain why there had been no effort to press the employer to rescind the ban on the 17 persons. One such reason was the technical one that nobody actually filed a grievance, although the Board is satisfied that written protests lodged with the union, or with top international officers of the union, could well have been taken to be grievances if the union had felt it ought to involve itself in the situation.

The fact is that the union really believed the 17 received their just deserts by being refused employment by the M.E.A. According to the testimony of Local 1654 president, Mark Fortman, these people had "tried to stick it to the union and union members" via the picket line which shut down the port in November; they had persisted in their picketing after rejecting a quite reasonable proposition which was designed to set up a fair method of giving 40 persons immediate union membership. As far as

Fortman and other union officers were concerned, the locals owed the 17 nothing more in the light of their past performance. Had they not engaged in that performance, had they not carried on a battle against the employment referral scheme approved by the union in November, 1988, many of them would have been eligible for - and probably would have been accepted into - the reserve pool in time for the 1989 shipping season. Some even would have become union members long before now.

The Board sees merit in the argument that the persons who were refused employment did not have "clean hands" and that the union's failure to take steps on their behalf, bearing in mind the whole context of the case, was not arbitrary, discriminatory or in bad faith, contrary to section 37 of the Code.

It was argued by the respondents that the persons who were barred from employment in the port were not actually employees and therefore could not benefit from section 37 of the Code. (The section says a union shall not act in a certain manner in the representation of any "employees"...). It may very well be that the casuals who gather in the union hiring hall on the Hamilton waterfront to obtain longshoring work are only employees once they are hired and are engaged in work, and cease to be employees thereafter - at least for the purposes of the collective agreement which covers them while they are at work.

For certain of the purposes of the Code, however, they would continue to be "employees" regardless of whether they were actually working or not at a particular point in time. For example, if a certification application were to be received to displace Local 1654 as the representative of

all longshoremen employed in the Port of Hamilton, we suspect that the Board would include in the bargaining unit not only the existing union members but also the "casual", non-union members who had a significant attachment to the waterfront labour force, just as the Board does with any other unit of employees under its jurisdiction.

The existing collective agreement between Local 1654 and the M.E.A., when it uses the term "employees" in respect of various terms and conditions in articles 5.05, 5.10 and 5.11, for example, turns "casuals" into employees for the purposes of these terms and conditions. Even the "waiver form" in article 3.13 contemplates that they shall have "employee" status, but only for the duration of each individual work assignment.

-

In the Board's opinion, casuals are "employees in the unit" for the purposes of section 37 with respect to matters in the collective agreement that actually apply to them. It appears, for example, that the collective agreement articles already referred to, as well as the provisions having to do with rates of pay, vacation pay and so on, establish rights which apply equally to casuals as much as to union members. In our view, alleged union failures of fair representation in respect of them could bring section 37 into play.

The real point is not that these people are not at certain times and for certain purposes "employees" and therefore at those times and for those purposes able to invoke section 37 if necessary, but it is that in this case there is nothing in the collective agreement which gives them any right to be recruited, selected or hired into the "reserve labour pool" or to be dispatched or selected for

employment. In the absence of a "right" under the collective agreement, in the final analysis the union could not effectively overturn the barring decision and section 37 cannot be applied to the union's conduct in that connection.

As the Board has indicated earlier, the complaint with respect to a violation by the union of section 69(2) was put in abeyance pending the outcome of the claims that the employers and the unions had violated the other sections of the Code referred to in these reasons. It was also alleged by the complainants that section 95(f) had been violated by Local 1654. This reads as follows:

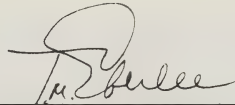
"95.(f) No trade union or person acting on behalf of a trade union shall expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;"

A complaint of a violation of section 95(f) is, of course, subject to the provisions of section 97(4). (The Board will leave any further comment on that aspect for the future.) Counsel for the complainants stated to the Board that this complaint was not being dropped but that he was not arguing it. In the light of that posture and in view of the fact that 95(f) has a close relationship to 69(2), the Board believes it fair to leave the 95(f) complaint in abeyance, as well.

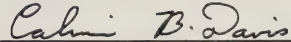
Our general conclusions as outlined in these reasons refer to Mr. Carter, as well as to the other complainants, certainly in respect of Mr. Carter's relationship to Local 1654 and the M.E.A. His complaint, however, was also

directed specifically at Local 1879, with which only the H.H.C. has a collective agreement. Mr. Carter has been on workers' compensation and unable to work since prior to the picket in November, 1988. We understand that he has not been barred from possible future work by the H.H.C. as a checker under the jurisdiction of Local 1879. Thus, he has in fact no complaint against the H.H.C. or Local 1879 in that regard.

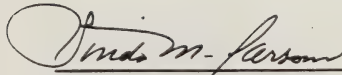
In summary and as for the other matters covered in these reasons, the Board concludes that it must dismiss the complaints in the two files alleging violation of sections 37, 94(1)(a), 94(3)(a)(i), 94(3)(e) and 96.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Linda M. Parsons
Member of the Board

ISSUED at Ottawa, this 8th day of February 1991.

information

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SUMMARY

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 375, MICHEL MURRAY AND MICHEL IAVARONE, COMPLAINANTS, AS WELL AS MARITIME EMPLOYERS' ASSOCIATION AND TERMONT TERMINAL INC., RESPONDENTS.

Board file: 745-3330

Decision No.: 850

Longshoring industry. Port of Montréal. Unfair labour practice complaint. Sections 94(1)(a), 94(3)(a) of the Canada Labour Code (Part I - Industrial Relations). Employer objects to Board's jurisdiction. (Part II - section 147). Complaint dismissed on its merits.

A union employee and a union officer, off duty, entered a worksite without the employer's permission. They alleged there was a violation of safety rules under Part II of the Code and started to distribute leaflets. The employer called the police and had them expelled.

Employer's objection

According to the employer the Board could not entertain this complaint filed under Part I since its purpose would be to ensure the application of Part II while the complainants are not invoking section 147. Objection dismissed. The recourses of Part I or II are cumulative.

Decision on the merits

After reviewing the facts, the Board found that the complainants had provoked the incident. They had not exercised a right protected by the Code. Complaint dismissed.

RESUME

L'ASSOCIATION INTERNATIONALE DES DEBARDEURS, SECTION LOCALE 375, MICHEL MURRAY ET MICHEL IAVARONE, PLAIGNANTS, ET ASSOCIATION DES EMPLOYEURS MARITIMES ET TERMONT TERMINAL INC., INTIMÉES.

Dossier du Conseil: 745-3330

Décision n°: 850

Secteur du débardage. Port de Montréal. Plainte de pratique déloyale. Partie I - Relations du travail, alinéas 94(1)a), 94(3)a) du Code. Objection de l'employeur à la compétence du Conseil. (Partie II - article 147). Plainte rejetée au mérite.

Un employé d'un syndicat et un dirigeant syndical en congé se sont présentés sur un lieu de travail sans la permission de l'employeur. Ils invoquaient la violation d'une règle de sécurité régie par la Partie II du Code et ont commencé à distribuer des tracts. L'employeur les a expulsés avec l'aide de la police.

Objection de l'employeur

Selon l'employeur le Conseil n'a pas compétence en vertu de la Partie I du Code parce que l'objet de la plainte est régi par la Partie II et que des plaignants n'ont pas invoqué l'article 147. Objection rejetée. Les recours de la Partie I et II sont cumulatifs.

Décision au fond

Après analyse des faits, le Conseil a jugé que les plaignants avaient provoqué l'incident et n'avaient pas exercé un droit protégé par le Code. Plainte rejetée.



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Canadien des
Relations du
Travail

Reasons for decision

International Longshoremen's
Association, Local 375,
Michel Murray and Michel Iavarone,

complainants,

and

Maritime Employers' Association
and Termont Terminal Inc.,

respondents.

Board File: 745-3330

The Board was composed of Mr. Serge Brault, Vice-Chair, as well as Ms. Ginette Gosselin and Mr. Robert Cadieux, Members.

Appearances

Mr. Luc Martineau, for the complainants;

Mr. Gérard Rochon, assisted by Ms. Line Perron, Director of Labour Relations, for the respondents; and

Mr. Raymond Piché, for the Canadian Coast Guard.

These reasons for decision were written by Mr. Serge Brault, Vice-Chair.

I

The proceeding

This decision deals with a complaint made by the International Longshoremen's Association, Local 375 (ILA), and by two of its officers, Michel Murray and Michel Iavarone, against the Maritime Employers' Association (MEA) and one of its members, Termont Terminal Inc. (Termont). The complaint, made pursuant to section 97(1) of the Canada Labour Code (Part I - Industrial Relations), alleges that the respondents contravened sections 94(1)(a) and 94(3)(a), which read as follows:

"94.1 (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."

Under the terms of a geographic certification issued under section 34(1)(a) of the Code, the union comprises nearly all of some 1500 dockers in the port of Montréal. The MEA is an employers' organization appointed under section 34(3)(a) of the Code to represent all the employers of these long-shoremen. At the time in question, these two associations were bound by a collective agreement.

At issue here essentially is Termont's decision of June 15, 1990 to expel from its premises, under police escort, complainants Murray and Iavarone who had entered these premises without prior authorization, claiming that they were exercising the rights conferred by Part II of the Code: Occupational Safety and Health.

A hearing into this case was held in Montréal on June 14 and 15 and October 29, 30 and 31, 1990.

II

The evidence

Mr. Murray is a professional longshoreman. He is normally assigned to Termont where, under his collective agreement, he is designated as the occupational health and safety delegate. We will have more to say on this subject later. He is also recording secretary of the union and hence a member of its executive.

On June 15, 1990, Mr. Iavarone, who is now a student, worked for the union as a health and safety adviser. Earlier, from 1982 to 1988, a period when the parties were not subject to the general scheme of Part II of the Code (see in this regard the present section 135), a joint health and safety committee conducted the inspections that are today the responsibility of Labour Canada or of Transport Canada, as the case may be. This committee was responsible, among other things, for investigating refusals to work for health or safety reasons (Part II, section 128). At the time, Mr. Iavarone worked for the joint committee as health and safety inspector in the port of Montréal. When this particular system ceased to operate, he went to work for the union.

Mr. Iavarone's job consists essentially in advising union stewards on health and safety matters and the union in general. In this capacity, he has no responsibility for labour relations. He is not a member of the union nor a longshoreman and is therefore not an employee of either the MEA or Termont.

The MEA explained to the Board the circumstances in which it refused Michel Murray and Michel Iavarone permission, on

June 15, 1990, to investigate an incident related to health and safety involving Termont.

Mr. R. Piechowiak, one of Termont's superintendents, testified that early in the morning on June 15, 1990, he was informed by a longshoreman employed as foreman that the union was preparing to hand out leaflets dealing with the health and safety problems caused by the faulty installation of gangways connecting docks and vessels. He gave Mr. Piechowiak a copy of the leaflet in question dated that same day.

Later that morning, Yves Côté, one of the union's business agents, visited Termont and brought to Mr. Piechowiak's attention a problem involving the gangway connecting the vessel Holcan Rijn and the dock. The end of the gangway was not resting flat on the surface of the dock but was suspended a few centimetres above it. Moreover, the safety net installed underneath did not extend the full length of the gangway.

According to the evidence, Mr. Piechowiak first directed the shipping company's representative to obtain and install immediately a regulation net beneath the gangway. He then assured the union's business agent that as soon as the work was finished, the gangway would be repositioned so that it was resting firmly on the dock. He assured him that in the meantime, a guard would be posted at the top of the gangway to ensure that no one used it. All this appeared to satisfy the business agent who then left. That business agent was not called to testify.

Shortly thereafter, Mr. Piechowiak obtained assurances that the shipping company had indeed ordered from the appropriate supplier a regulation net which, he stated, was

finally delivered that afternoon. In the meantime, two pieces of non-regulation net were installed beneath the gangway.

Mr. Murray was not on duty at Termont on the morning of June 15. His shift was not scheduled to begin until 6:30 p.m. He nevertheless went to the union office early that morning to prepare to distribute the leaflet dealing with unsafe gangways.

Messrs. Iavarone and Murray testified that early in the morning on June 15, they met at the union office and decided to visit the longshoremen's dispatching hall located on MEA premises. The longshoremen normally collected their pay there and this was where the complainants intended to hand out their leaflet.

After they arrived at the dispatching hall, a longshoreman told them about a problem with a gangway at Termont. They finished distributing their leaflet and, around 10:15 a.m., decided to visit Termont.

Around 10:30 a.m., the complainants arrived at Termont and entered its premises without authorization, although no one denied them entry. They received a rather cool reception. They were interested in the gangway, but to the employer, this issue was not important. Management informed them that it had complied with all provisions of the collective agreement relating to this type of problem. In particular, the employer reminded Mr. Iavarone that he had no authority under the collective agreement to intervene. As for Mr. Murray, insofar as the employer was concerned, he had no authority because he was not on duty and was therefore not acting in his capacity as health and safety delegate at

the time. Mr. Piechowiak therefore asked them to leave the premises. They refused and a heated discussion ensued.

Messrs. Iavarone and Murray admitted that they distributed leaflets during their visit. They were, they said, having difficulty persuading their management counterparts of the seriousness of the problem with the gangway, so they simply decided to take the opportunity to distribute their leaflets to the longshoremen who came by. Their objective was, according to Mr. Iavarone, to generate discussion about the gangway. The complaint states that the leaflets were intended for distribution to longshoremen who were reporting for work. It is not clear from the evidence how many leaflets were handed out and to whom.

As the situation grew more tense, Mr. Piechowiak decided to consult his own superior, Roger Carré, who told him to call the police if necessary, which he did immediately. He also telephoned the MEA which sent labour relations personnel to the scene. Following the arrival of Ports Canada police officers, a long conversation ensued in which the union's two business agents, who had themselves been sent to the scene, also participated. Following this conversation, the police escorted the complainants off the premises. The business agents were not asked to testify.

Right in the middle of what became a crowd, the two complainants left the premises and returned to the union office. Once there, they immediately filed a complaint under section 148 of the Code (Part II) with Labour Canada. They alleged that the gangway did not conform to regulations.

Given the nature of the complaint, Labour Canada dispatched to the scene a Canadian Coast Guard safety officer

responsible for investigating safety matters aboard vessels. This officer, inspector Guy Germain, arrived at the work site shortly after noon. The complainants, for their part, decided to go and meet with Mr. Germain.

The first thing Mr. Germain did upon his arrival, and before the complainant reached the work site, was to begin an inspection in the company of Termont's representative, Mr. Piechowiak. Later, at the complainants' instigation, Mr. A. Mercier, who was designated as union delegate in health and safety matters under clause 11.04 of the collective agreement, joined the inspection.

According to the parties, Mr. Germain issued a direction at the conclusion of his investigation and the situation was rectified. In fact, shortly thereafter, the nets installed beneath the gangway were replaced with a net extending its full length.

Following a long discussion concerning section 144, the details of which need not be related here, the parties agreed that Mr. Germain would not testify and that his report, initially submitted by the complainants, would be withdrawn from the file. This issue was the reason for the presence of counsel for the Coast Guard at the hearing.

Mr. Murray, for his part, testified that he visited the work site the following day and noted that the employer was continuing to comply fully with the regulations. It had even gone so far as to install a net all along the dock, in addition to the full length of the gangway.

Finally, the Board noted that no one had grieved the June 15 incident. Mr. Murray attributed this omission to his inexperience.

III

The context

It is appropriate to quote the following provisions of the relevant collective agreement signed on August 5, 1988:

"11.01

In matters of health and safety, Part [II] of the Canada Labour Code will apply.

11.02

a) There will be a distinct health and safety committee, as stipulated in Part [II] of the Canada Labour Code, established for each of the following work sites:

*Cast
Ace, Section 74
Termon
...*

b) The formation, the composition, the operation of each of these nine (9) health and safety committees are according to the provisions of Part [II] of the Canada Labour Code.

11.03

a) In accordance with the provisions of Section [135(13)] of Part [II] of the Canada Labour Code, each health and safety committee will establish, for its work site, procedural rules governing its operation.

b) However, each committee will have to include in its rules that, in accordance with the provisions of Section [128] of Part [II] of the Labour Code, operations which are the responsibility of the committee on the work sites are delegated to other employees, in the absence of members of the committee. Thus, each committee specifies in its rules the sufficient number and identity of the employees who will act as delegates in the absence of members of the committee, for the sole purpose of substituting for the committee in the application of Section [128], Part [II] of the Canada Labour Code.

c) If members of the health and safety committee cannot agree concerning the designation of their delegates, the employee chosen as the employees' representative on the health and safety committee will prevail.

11.04

a) *Members of the health and safety committee as well as their delegates must not possess classifications which would hinder the continuation of operations should it become necessary to leave their work in accordance with Part [II] of the Labour Code for members of the committee and its Section [128] for its delegates.*

b) *The Maritime Employers Association will give priority of assignment to members of the committee and their delegates in order to insure at all times that there will be one of these persons available at each work site so as to meet the requirements of Section [128] if needed.*

(emphasis added)

Mr. Murray is one of the delegates who are specifically referred to in clause 11.04a) of the collective agreement. According to the complaint (paragraph 9), on the morning in question, Léo Clermont was the union delegate on duty.

A health and safety committee, which held regular monthly meetings, was in fact established at Termont in 1989. This committee was co-chaired by Mr. Piechowiak, for the employer, and Raymond Giroux, for the union. Moreover, longshoremen, including Mr. Murray of Termont, were designated as delegates and took turns serving in this capacity, depending on the shift they worked.

When the employer dispatches manpower, it designates by computer, from among the employee delegates who are scheduled to be on duty at a given time, the person who in fact will serve as delegate during a particular shift. If a problem arises, employees consult him. This person's name appears on the dispatch reports that are published on the evening preceding each new workday. Copies of these reports are also given to the walking bosses, who are themselves union members. Since the summer of 1990, these documents have also been posted in the hiring hall, although the

evidence did not establish that such was the case on June 15, 1990.

If an incident requiring the delegate's intervention occurs, the delegate is then relieved of his duties and asked to help resolve the problem. This brings us back to the question of the role of delegates in the light of clause 11.04 of the collective agreement.

In the course of its meetings, the Termont health and safety committee agreed that the role of the delegates, initially limited to work refusals under section 128 of the Code, would be expanded to include other situations. Specifically, on May 31, 1989, the committee unanimously adopted a resolution to extend delegates' authority to encompass all of Part II of the Code, instead of only the refusals to work.

During the June 15, 1990 incident, the management of Termont felt that neither Mr. Iavarone, who had no authority under the collective agreement, nor Mr. Murray, who was not the designated delegate that day, had any role to play in resolving the matter. This explains why Termont apparently refused to deal with them and summoned the delegate on duty at the time.

Having said this, the Board, purely to provide more of the context in which this incident took place, deems it appropriate to reproduce the following letter from the president of the MEA to the then president of Local 375 of the union:

"Tuesday, May 30, 1989

Mr. Théodore Beaudin
President
International Longshoremen's
Association, Local 375

...

Dear Sir:

On a number of occasions in recent months, your technical adviser, Mr. Iavarone, intervened directly during the loading or unloading of vessels in the port of Montréal to prevent employees from performing their work, on the pretext that certain situations posed a danger. He even took it upon himself to require that certain changes be made to either work procedures or the conditions under which longshoring work is performed. Moreover, he visited the work site without first obtaining the authorization of the company concerned and without contacting the persons responsible for safety, namely, the two co-chairmen of the safety committee, or their delegates in the case of a refusal to work.

We wish to remind you that such conduct is unacceptable and contrary to the established rules. All representations relating to health and safety must first be made to the MEA which, as the employer, is responsible for health and safety, or to the employee co-chairman of the committee. It is then up to these authorities to take the necessary steps to ensure that the dangerous situation is rectified, if a danger exists. While we can appreciate that, as technical adviser for health and safety, his job is to identify certain violations where they occur, we cannot tolerate his dealing directly with the employees.

We are therefore asking you to ensure that Mr. Iavarone changes his way of proceeding in health and safety matters by allowing the committees that are already in place to play their role fully through the committee members designated by the parties.

Please be advised that we can no longer tolerate his dealing directly with the employees, contrary to established rules, and that we regard such conduct as contrary to the spirit and letter of Part II of the Canada Labour Code. Any recurrence of this behaviour will force us to take the appropriate corrective action.

We are certain that you can appreciate the importance of all parties working together in order, insofar as possible, to avoid conflicts.

Yours truly,

Bryan P. Mackasey
President"

(translation; emphasis added)

President Beaudin did not challenge this letter through the grievance procedure. However, he did reply to the employer in a letter in which he took somewhat the same tone as his management counterpart. He essentially criticized the employer for what he felt was the inappropriate action of certain contract administrators, i.e. labour relations officers of the MEA. Regarding Mr. Iavarone's role, Mr. Beaudin wrote:

"For your information, Mr. Iavarone was hired by our union as a health and safety adviser and has thus far done an excellent job. He visits the port only at the invitation of either the union's business agents or officials of the health and safety committees."

(translation)

The Board also considers the following provision of the collective agreement germane to the present case:

"1.03

a) Within thirty (30) days of the signing of the collective agreement, Local 375 shall advise the Maritime Employers Association in writing of the names of its business agents and members of its grievance committee. Management recognizes the right of the Union to nominate or select a president and business agents and agrees to recognize each of these persons for purposes of administration of the present collective agreement. However, it is understood that in the execution of their duties, the president and the business agents will not interfere in the exercise by the companies of their right to determine and direct operation methods and procedures in conformity with the provisions of the present agreement.

Management will not unduly refuse a reasonable request for leave of absence from a member of the Union executive if said request is submitted at least twenty-four (24) hours in advance.

b) No provision of the present collective agreement can be interpreted as allowing any member of the grievance committee or any other officer of the Union to give orders to foremen or employees in relation with their work. Neither the Maritime Employers Association nor any of the companies as well as the union will adopt any directive, rule or resolution which are contrary to the provisions of the present agreement.

(emphasis added)

Neither complainant was therefore designated or recognized union representative for the purposes of the collective agreement.

The question of access to the work site is dealt with in the following excerpt from the MEA's letter of January 1989 to the union:

"In order to avoid any possible confusion concerning the respective roles of the parties, we would ask you in future, when you wish to visit a work site, and even before you proceed to this work site, to please contact the manager of the company concerned (or in his absence, the superintendent) and explain to him the problem, if any, or the reason for your visit. Moreover, the company reserves the right to designate a representative to accompany you while you are on the work site."

(translation)

The Board will not relate a number of additional facts that are not central to the matter at issue here, yet were submitted in evidence to enlighten it as to the context in which the June 15 incident took place. Both parties recognized that only the events of June 15 were germane to the complaint. According to the union, June 15 was the culmination of what it termed a campaign to undermine union activities with respect to health and safety matters.

IV

The arguments

Initially, counsel for the employer argued that all the elements were present in this case to warrant the Board's refusing to decide the merits of the complaint and referring it instead to arbitration under section 98(3). However, this request was withdrawn and there is no need to deal with it.

However, according to counsel, the Board lacked jurisdiction to entertain this complaint made pursuant to the provisions of Part I of the Code since the complaint essentially alleged breaches of Part II of the Code. According to Mr. Rochon, the rights of unions in health and safety matters are defined in Part II of the Code and the only recourse against contraventions of these rights is a complaint under sections 133 and 147 of Part II of the Code. Since the complaint in the instant case was made under section 94 of Part I, this is not the appropriate recourse and the Board has no authority to hear it. Section 147(a)(iii) of the Code reads as follows:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part;..."

According to counsel for the MEA, the intent of Part I of the Code differs greatly from the intent of Part II. If, in Part I, the union is the privileged counterpart of management, such is not the case in Part II where its role is limited to designating representatives to serve on a committee, as required (section 135(1)(b)).

Addressing the merits of the allegation of a breach of section 94(1)(a), counsel for the MEA denied that the complainants had in any way been prevented from representing the employees, if in fact this provision applied. Counsel

argued that this provision is primarily concerned with collective bargaining, and in support of this argument, he cited the decisions in ATV New Brunswick Limited (CKCW-TV) (1978), 29 di 23; and [1979] 3 Can LRBR 342 (CLRB no. 149); and Télévision Saint-François Inc. (1981), 43 di 175 (CLRB no. 306). He pointed out that the right to distribute leaflets is not absolute (see Lila K. Walker et al. (1989), as yet unreported CLRB decision no. 754).

With regard to section 94(3)(a), counsel pointed out that no employee who was on the work site either claimed the right to refuse to work conferred by section 128 of the Code or invoked section 147.

For the union, this case raised a fundamental question: does the right and the duty of representation of a trade union recognized in Part I of the Code extend to health and safety matters that are regulated in Part II of the Code?

According to counsel for the union, the MEA and the ILA were involved in a showdown over this question. In the union's view, Part II of the Code does not affect the union's power of representation which encompasses all working conditions, including health matters.

On June 15, argued Mr. Martineau, the complainants merely assisted employees and this required free access to the work sites by these union representatives (see Canada Post Corp. (1988), 7 CLRBR (2d) 245 (CLRB no. 772); and Maritime Employers' Association (1985), 63 di 69; and 12 CLRBR (NS) 18 (CLRB no. 540)). According to counsel, the decision not to file a grievance was of no significance. The right to distribute leaflets was recognized and was violated in the instant case (see Canada Post Corporation (1987), 69 di 91 (CLRB no. 620)). Had the complainants not intervened,

counsel argued, the problem with the gangways would never have been solved. He termed extreme the conditions governing access to the work sites imposed by the MEA and added that this was not the type of question that should be referred to arbitration given the allegation of anti-union animus on the part of the employer (see CFCN Television (a division of CFCN Communications Limited) (1988), 76 di 8; and 89 CLLC 16,008 (CLRB no. 719).

V

The decision

The Board devoted five hearing days to this case.

For the employer, the case raised major legal issues; for the union, central policy issues.

Make no mistake about it, a kind of power struggle is going on between some of the protagonists; with respect, what is really at stake here is clearly a simpler issue.

The legal issue that divides the parties reminds the Board of the one raised in Ronald D. Sabourin (1987), 69 di 61 (CLRB no. 618). At issue in that case was the Board's jurisdiction under what are now Parts I and II of the Code. In its decision, the Board relied on a judgment of the Nova Scotia Supreme Court dealing with a disciplinary action that had been challenged through a grievance, and not through a complaint to the Board, for actions of an employee that, in the employee's opinion, were justified on health and safety grounds (Canada Post Corp. v. Canadian Union of Postal Workers (1987), 76 N.S.R. (2d) 285 (N.S.S.C.)). There is no need to relate the facts of the case which are well summarized in Ronald D. Sabourin, supra. Mr. Justice Rogers of the Nova Scotia Supreme Court had the following to say:

"[15] Canada Post contends that Part [II] of the Canada Labour Code establishes an exclusive scheme for the protection of health and safety of employees in the federal sector... and effectively [rules] out the application of the health and safety provisions in the collective agreement negotiated between Canada Post and CUPW found in Articles 33 and 34 of that agreement.

[16] The Union on the other hand contends that the Canada Labour Code, Part [II], and the collective agreement provide concurrent regimes for the protection of the employees of Canada Post as to their health and safety.

[17] Canada Post argues that the Canada Labour Code, Part [II], applies to the situation which arose in June... and the provisions of the Code lay down that the disputes which arose in this case are not arbitrable and therefore the arbitrator was wrong in concluding that he did in fact have jurisdiction to hear the grievances.

...

[23] Canada Post argues that the first eighteen grievances come within the purview of s. [147] of the Code, and therefore are governed by s. [133] of the Code, particularly [133(4)], which effectively bars referral by an employee of a grievance triggered by s. [147].

[24] I will deal first with Canada Post's argument that s. [131] of the Code necessarily implies the exclusion of the operation of any collective agreement term with respect to refusal issues in the absence of ministerial consent. Section [131], first of all, is permissive, and not restrictive. It provides a vehicle for the Minister to exclude employees from the application of the Code's safety provisions, if the collective agreement contains at least as effective safety and health provisions, if the employer and employee see fit to jointly apply for such exclusion.

[25] The section [131] can in no way be read to mean that the Minister's consent is necessary for the Code not to apply. There is no requirement that freely negotiated provisions in the collective agreement with respect to health and safety meet the Minister's approval for validity.

[26] This section in my view merely provides for minimum health and safety standards and does not interfere with employees negotiating more effective standards than those set out in the Code.

...

[28] The permissive nature of s. [131] permits concurrent jurisdiction under the Canada Labour Code and the collective agreement. It does not confine an employee's right to complain of disciplinary action taken following refusal to work to those procedures set out in the Code.

[29] Surely it was the intent of Parliament to provide for the protection of employees' health and safety, but not to limit that protection to that provided by the Code. If the argument of Canada Post is accepted that s. [131] is restrictive and not permissive, the minimum standards of the Labour Code would become the norm and the limit because it would be open to an employer, including in this case Canada Post, to foil any attempt of the employees to have their superior and freely negotiated health and safety rights take precedence over the minimum standard set out in the Code by refusing to join in the application to the Minister."

(pages 288-290)

Clearly the MEA's objection in the instant case does not deal with the same issue, but it nevertheless implies that Parts I and II of the Code would a priori be mutually exclusive. It follows, argues the employer, that for example interference by an employer in the free representation of employees in health and safety matters is punishable only under Part II of the Code, if in fact it deals with this matter. According to this argument, a union could not make a complaint in its own right because section 133 confers this right on employees only.

We cannot accept this interpretation which, in our opinion, is contrary to the Code and above all ultimately harmful to both parties. Section 131, with which the parties are very familiar, stipulates the following:

"131. The Minister may, on the joint application of the parties to a collective agreement if the Minister is satisfied that the agreement contains provisions that are at least as effective as those under sections 128 to 130 in protecting the employees to whom the agreement relates from danger to their safety or health, exclude the employees from the application of those sections for the period during which the agreement remains in force."

The very existence of section 131 presupposes that the parties can negotiate health and safety matters. These matters are therefore terms and conditions of employment within the meaning of section 3(1) of the Code:

"'collective agreement' means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters."

(emphasis added)

This being the case, a union necessarily has the right to represent employees in these matters, without employer interference within the meaning of section 94(1) of the Code.

An employer cannot intervene with impunity in the representation of employees in health and safety matters by simply arguing that Part II of the Code does not grant any recourse to unions in these matters. The Code does not preclude such recourse in health and safety matters. The apparent silence of Part II merely avoids repetition because Part I of the Code already deals with the subject.

That addresses the issue of the Code. Was there undue interference or unlawful intervention by the employer in the instant case?

In 1988, the parties negotiated for the first time a new procedure governing health and safety matters. The employer appears satisfied with its application as a whole and, generally, so does the union executive. The Board cannot minimize the fact that this new procedure has not given rise to any grievances or that the main union officials responsible for health and safety matters in all

likelihood saw no need to appear as witnesses before the Board in the instant case.

Clearly, a safety problem existed on the morning of June 15, 1990. According to the evidence presented on this point, which was not contradicted, corrective measures were taken even before the complainants arrived at the work site. There is further uncontradicted evidence that the solution adopted was agreed to by a business agent early that morning on June 15.

The fact that the union officers officially responsible for relations with the employer asked the complainants to leave the work site sometime later, in the presence of police officers, precisely because they were going to deal with the matter themselves, confirms to us that the union was not prevented from acting. That it acted through its authorized representatives in a manner different from that recommended by the complainants in no way alters the fundamental fact that it acted.

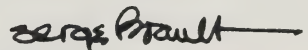
In the final analysis, and with respect, one has to wonder whether the complainants were not the victims of their own inexperience in labour relations matters, which, moreover, one of them admitted.

With regard to the correspondence exchanged before June 15, it clearly reveals that Mr. Iavarone, for example, had neither the employer's permission, nor the union's mandate to do what he did in showing up at Termont unannounced. The same can be said of Mr. Murray. The union cannot assert its right to negotiate these matters with the full force of Part I of the Code and in the same breath disregard what it has negotiated. The issue here is one of good faith and sound labour relations. If the employer contravenes the

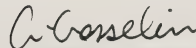
agreement, the remedies are there, just as they are when it contravenes the Code. However, it is difficult to see how the union could allege that Termont contravened the Code when in fact Termont insisted that the channels of communication negotiated by the parties be followed. Finally, on examining the evidence, the Board does not believe, despite appearances, that anti-union animus was present in the instant case.

The Board can only earnestly urge the union and management officials to put this matter behind them and ensure that those responsible for health and safety turn their attention to matters of substance.

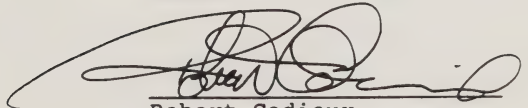
For all these reasons, the Board finds that the complaint is unfounded and dismisses it.



Serge Brault
Vice-Chair



Ginette Gosselin
Member of the Board



Robert Cadieux
Member of the Board

ISSUED at Ottawa, this 12th day of February 1991.

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- 242

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Summary

SOCIETY OF PROFESSIONAL ENGINEERS
AND ASSOCIATES, AECL-CANDU
OPERATIONS, APPLICANT UNION, AND
ATOMIC ENERGY OF CANADA LTD. -
CANDU OPERATIONS, EMPLOYER.

Board File: 530-1528

Decision No.: 851

The Society of Professional
Engineers and Associates, AECL -
CANDU Operations, asked the Board
to amend the 1974 certification
order to include "branch managers"
as a class in their bargaining unit
at Atomic Energy of Canada Ltd. -

The Board concluded that branch
managers perform "management
functions" within the meaning of
the Canada Labour Code and are
properly excluded from the unit.

Résumé de Décision

LA SOCIÉTÉ DES INGÉNIEURS
PROFESSIONNELS ET ASSOCIÉS -
OPÉRATIONS CANDU, SYNDICAT
REQUÉRANT, ET ÉNERGIE ATOMIQUE DU
CANADA LTÉE - OPÉRATIONS CANDU,
EMPLOYEUR.

Dossier du Conseil: 530-1528

No de Décision: 851

La Société des ingénieurs
professionnels et associés -
opérations CANDU, ÉACL, a demandé
au Conseil de modifier l'ordonnance
d'accréditation rendue en 1974 de
sorte que soit incluse dans son
unité de négociation visant Énergie
atomique du Canada Ltée -
opérations CANDU une catégorie
comprenant les «directeurs de
division».

Le Conseil a conclu que les
directeurs de division exerçaient
des «fonctions de direction» au
sens où l'entend le Code canadien
du travail et qu'il était donc
pertinent qu'ils soient exclus de
l'unité.



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Labour
Relations
Board

Conseil
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Travail

Reasons for decision

Society of Professional
Engineers and Associates,
AECL-CANDU Operations,

applicant union,

and

Atomic Energy of Canada Ltd. -
CANDU Operations,

employer.

Board File: 530-1528

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Members James D. Abson and Evelyn Bourassa.

The reasons for decision were written by Vice-Chairman
Eberlee.

Appearances:

Aubrey E. Golden, for the Society of Professional Engineers
and Associates, AECL-CANDU Operations;

William J. Hayter, for Atomic Energy of Canada Ltd. - CANDU
Operations.

I

The Society of Professional Engineers and Associates, AECL-
CANDU Operations, (S.P.E.A.) has asked the Board to amend
the certification order issued in 1974 so as to include
within the bargaining unit positions described as "branch"
heads or managers.

This certificate, dated December 9, 1974, gave S.P.E.A.
the right to bargain on behalf of a unit of professional
employees, including professional engineers, scientists,
librarians and public relations personnel of what is now
Atomic Energy of Canada Ltd. - CANDU Operations, excluding

certain management personnel, "branch heads" and others. Over the succeeding years, the parties have somewhat re-defined or up-dated the language of the certificate - although its actual intent remains unaltered - by negotiating a scope clause into the collective agreement which refers to "branch heads" as "branch managers".

S.P.E.A. argues that branch managers no longer - if they ever did - perform management functions. The Board was told that since 1974, additional levels of management, notably "department managers", have been installed between the top and the branch managers, and other developments have occurred, with the result that the branch managers no longer are actually managers within the meaning of the Canada Labour Code (Part I - Industrial Relations) and they should be included in the S.P.E.A. bargaining unit.

The application in this matter was filed with the Board on September 25, 1987. There followed the usual investigation by a Board officer and the submission of a detailed report. The Board scheduled a hearing for August 23, 1988 but asked for a clearer and more detailed, written rationale from the union supporting the general purpose of its application, plus certain information from the employer, all to be supplied by August 1, 1988. The net result of this request was little further enlightenment.

A panel of the Board met the parties on August 23, 1988, at which time the union asked, and the employer agreed, that the Board not proceed to hear the matter at that time but that it appoint an investigating officer to deal with the parties to attempt to put together a fuller factual background for a later Board determination of the

application. The Board acceded to the parties' proposal and appointed Senior Labour Relations Officer Carol Garrow to undertake this task, investing her with the authority to establish terms of reference, set a schedule and impose time limits on the parties so that the job might be completed within a reasonable period of time.

When Mrs. Garrow began her work with the parties there were upwards of 70 positions, variously titled, which the employer claimed as exclusions from the bargaining unit on the ground they were manager positions and the union felt should be placed in the unit. The result of Mrs. Garrow's efforts - which were deservedly praised by all parties, including the Board - was that when the matter was finally heard on October 15, 16, 17 and 30, 1990 not only had the area of contention narrowed to somewhat more than 30 positions but the Board and the parties had in front of them a most comprehensive report on the functions and relationships of the disputed jobs.

II

The issue was presented to the Board at the hearing as being basically one of a "global" character: the Board had to determine whether it was still valid to exclude branch heads or managers as a class from the bargaining unit. The Board was not called upon to focus on each job individually and specifically either to judge whether, at a certain point in time, it was in or out of the unit, or to act as a sort of classification review tribunal determining whether particular positions were properly classified.

The context in which these positions function is quite unlike those of most of the private sector enterprises that the Board encounters. In the first place, the units which these positions lead are generally composed of employees trained as professionals, the bulk of them in various branches of engineering, sometimes quite esoteric to the layman; in their day-to-day work these employees apply their professional training, usually at high levels of expertise. Their work is about as far as anything can be from routine or repetitive. They have, and must have, a large degree of autonomy in order to do their jobs properly, yet they must also be collegial in order to discharge efficiently the over-all work responsibilities of their group. But, it goes without saying, that they also cannot function effectively without leadership. After listening to the testimony of both C.M. Bailey, called as a witness by the union, and Edward Hinchley, placed on the witness stand by the employer, the Board considers it apparent that the functions of the leaders of these units are not simply those of lead hands or supervisors who make sure that the human "machine" ticks away so that production comes out at the end. Those functions are in themselves highly significant, including and going well beyond the normal sorts of "people management" activities that tend to distinguish the managers from the "employees" in other organizations.

A.E.C.L. - CANDU Operations is also highly bureaucratized, with a strong hierarchical structure, almost to the same extent as any government operation which must bow to the dictates of Treasury Board or all the other governmental central control agencies. (Of course, AECL - CANDU is a

Crown Corporation.) The Board was presented with several score pages of procedural rules governing every conceivable aspect of the management of the enterprise from the most senior to the most junior levels of management. In many cases, these rules specify the extent of actual authority that each level of management possesses in respect of making decisions in specific subject areas. A review of these procedural rules shows that even vice-presidents are circumscribed and have a relatively less broad area of discretion than does the president. Those in charge of projects, and departmental managers have less still. And finally, the branch managers, at the lowest level of management, are expected to make decisions but those matters over which they have the final say are even smaller in number and lesser in importance. There is, in other words, a clearly delineated hierarchy of decision-making powers, with broad power at the top and lesser power at the bottom. It is clear, however, from the documentation and testimony before the Board, that the powers of the branch heads, although less than those of the managers above, are nevertheless real.

In certain instances, branch managers have power to initiate but cannot immediately implement without the signature of a designated person above or in one of the "central agencies" of the company, such as the personnel department; in that case, the counter-signature strikes the Board as being required so as to attest to the fact that the required steps in the procedure have been followed or that the action is consistent with corporate plans or policies. It is in the nature of an audit approval. The procedural rules indicate that these kinds of approvals are

required at all levels of management, but to a diminishing degree toward the top. They are the hallmarks of a large, bureaucratic organization. They do not dilute a person's "management functions" so much as they make the job of managing more challenging and complex.

There was some suggestion by S.P.E.A. that a real manager is somebody who not only applies rules but established them in the first place and that because the branch managers, to a considerable extent, operate within the boundaries of rules set elsewhere in the organization, they are not really managers but simply supervisors. That of course depends upon the rules and whether the scope for individual decision-making within the boundaries of those rules is significant or not. The Board is satisfied from a study of the documentation before it and from the testimony of the witnesses that the duties and responsibilities of the branch managers and their decision-making powers with respect to planning, budgeting, directing, controlling and being accountable for the over-all operations and outputs of their units, as well as with respect to the personnel management of individuals - hiring, initiating discipline in the rare instances where it may be required, performance monitoring and appraisal, pay increases or special pay rewards, career development, promotion - all add up to a level of significance that places the positions into the realm of management. Certainly, in the Board's view, the employer intends that the branch heads shall exercise management functions.

It is clear to the Board, particularly from the testimony of Mr. Bailey, that there are perceived anomalies

throughout the organization. It was claimed that a few "managers" do not actually function as managers. That may be. But, having taken a "global approach" to the issue and having not heard testimony from individuals as to what they actually do, the Board is not in a position to determine that there are exceptions to the employer's clear intention. These would seem to the Board to be more in the nature of classification questions that should be approached via the grievance and arbitration machinery that now exists in the collective agreement.

Mr. Bailey asserted, for example, that "specialists" who may have managerial rank but only give advice should be in the bargaining unit. For the Board to agree and to try to make an unqualified general rule out of such an assertion without any facts about the level of advice being provided and the level to which that advice was directed would be somewhat presumptuous and foolhardy. If the union has genuine cause to believe that a certain position is legitimately within the bargaining unit and should not be classified so as to place it within the management exclusions, the union's appropriate course of action is to invoke Article 1.04 of the collective agreement. This provides the means for resolving what the parties describe as "jurisdictional disputes".

No doubt many anomalies have arisen because AECL - CANDU has been in an exceedingly fluid state over the past few years. Since the middle '80's, its business volumes have declined sharply and its prospects continue to be for a diminished level of activity, compared with earlier years. The result has been that the work force has been cut back

drastically; there have been many lay-offs in the S.P.E.A. bargaining unit and some in the management group. The proportion of total management personnel in the organization to the whole work force has increased. Whatever one may feel about the equity of this situation, the Board does not see it, however, as a reason for concluding that a class of positions, or that specific positions, should be stricken from the list of management exclusions.

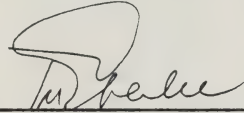
We are convinced, on the basis of the general picture painted for us, that the employer expects, intends and wants the branch management positions to exercise management functions and has on paper certainly invested them with the necessary powers. While the "global approach" did not involve us in hearing from individuals about what they actually do, we were able to review documentation describing most, if not all, of the 30 or more positions cited by the union as supporting their case that the branch manager group should be excluded from the unit. Without quoting chapter and verse, the Board is satisfied that the jobs do not support S.P.E.A.'s contention and that in the main these individual positions do actually perform management functions. Not only the general picture, but the specifics, such as they are, lead us to conclude that branch managers as a class are managers.

Several marketing director positions are included in the list of 30+ jobs cited by the union as being non-management. A few of these positions are now occupied by S.P.E.A. members and are within the unit; one was said to be occupied by a non-professional and therefore not part of the contention in this case. Several others are now excluded from the unit as being branch managers. The Board

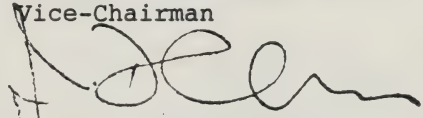
believes that the issues here are essentially those of classification and are best left to the collective agreement machinery. The fact that some are in the unit and some are out does not strengthen S.P.E.A.'s "global" case, in our opinion.

III

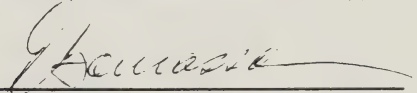
In summary, then, the Board concludes that the branch head or branch manager positions perform management functions and are properly excluded from the bargaining unit. The file is therefore closed.



Thomas M. Eberlee
Vice-Chairman



James D. Abson
Member of the Board



Evelyn Bourassa
Member of the Board

ISSUED at Ottawa, this 15th day of February 1991

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152

Summary

DAVE MULLIN, COMPLAINANT; CANADIAN
UNION OF POSTAL WORKERS, RESPONDENT
BARGAINING AGENT; AND CANADA POST
CORPORATION, EMPLOYER.

Board File: 745-3701

Decision No.: 852

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Résumé de Décision

DAVE MULLIN, PLAIGNANT; LE SYNDICAT
DES POSTIERS DU CANADA, AGENT
NÉGOCIATEUR INTIMÉ; ET LA SOCIÉTÉ
CANADIENNE DES POSTES, EMPLOYEUR.

Dossier du Conseil: 745-3701

N° de Décision: 852

This is a complaint under the duty of
fair representation provisions in the
Code wherein the union missed a
crucial time limit while processing
a dismissal grievance to arbitration.
As a result, the complainant was
deprived of the opportunity to have
his dismissal arbitrated.

The complaint was dismissed. In its
reasons, the Board reviews the
standards of representation and the
prohibitions against abuse of a
bargaining agent's exclusive
representational authority. The Board
highlights the need for caution
against unwarranted intrusion in the
collective bargaining system by the
Board based only upon the consequences
of honest mistakes by bargaining
agents. Here, the Board was satisfied
that the union had acted in good faith
and in the circumstances, where a
grievance had simply fallen through
the cracks in the system, this was no
grounds to support a finding that the
union had violated the Code.

Il s'agit d'une plainte alléguant un
manquement au devoir de représentation
juste prévu par le Code. Le syndicat
aurait manqué un délai crucial lors
du traitement d'un grief portant sur
un congédiement. Par conséquent, le
plaignant aurait été privé de la
possibilité de voir son grief renvoyé
à l'arbitrage.

La plainte a été rejetée. Dans ses
motifs, le Conseil a passé en revue
les normes de représentation et les
interdictions d'abus du pouvoir de
représentation exclusif d'un agent
négociateur. Le Conseil a fait
ressortir la nécessité de faire preuve
de prudence contre son ingérence non
justifiée dans le régime de
négociation collective en se fondant
simplement sur les conséquences
d'erreurs légitimes des agents
négociateurs. En l'espèce, le Conseil
est convaincu que le syndicat a agi
de bonne foi et, dans les
circonstances, le fait que le
plaignant a été victime des failles
du système ne justifie pas une
conclusion que le syndicat a violé le
Code.



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Reasons for decision

Dave Mullin,
complainant,
Canadian Union of Postal
Workers,
respondent bargaining agent,
and
Canada Post Corporation,
employer.

Board File: 745-3701

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Dave Mullin, for himself;
Messrs. Ken Bird and Gordon Fischer, for the Canadian Union of Postal Workers; and
Mr. Zygmunt Machelak, counsel for Canada Post Corporation.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

In this complaint which was filed with the Board on July 16, 1990, Mr. Dave Mullin (the complainant) alleges that the Canadian Union of Postal Workers (CUPW or the union) breached section 37 of the Code by failing to observe a time limit in the relevant collective agreement which resulted in an arbitrator dismissing the complainant's

dismissal grievance without it having been heard on its merits. Section 37 of the Code provides:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

According to the complainant the union's inexcusable conduct has deprived him of any redress under the collective agreement and he asks the Board to remedy the situation by intervening to waive the time limits in the collective agreement and to order the union to proceed to arbitrate his grievance on its merit.

One unusual and interesting aspect of this case is that CUPW, in its reply to the complaint, admitted that it had violated its representational responsibilities under the Code. The union agreed with the remedy sought by the complainant that the Board use its remedial powers to waive the time limits in the collective agreement and refer the matter back to the arbitrator for adjudication on the merits of the dismissal.

Canada Post Corporation (CPC or the employer) objected strenuously to the Board interfering with the arbitration process, particularly after an arbitrator had dealt with the grievance and had rendered a decision. CPC submitted that CUPW ought not be permitted this second opportunity to bypass the mandatory time limits in the collective agreement which the union had negotiated. CPC also raised the issue

of the timeliness of this complaint to the Board in light of the 90-day time limit under section 97(2) of the Code:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

The employer took the position that the complainant, having been an official of CUPW for several years, knew or ought to have known that the time limits had been missed for advancing his grievance to arbitration long before the 90- day period preceding the filing of his complaint on July 16, 1990. CPC's preliminary argument was that the complainant ought to have known about the missed time limits in August 1989. In the alternative, CPC submitted that at the very latest, the complainant had, by his own admission, been informed officially by CUPW at a pre-arbitration meeting on April 3, 1990 about the position being taken by the employer that the grievance was out of time for referral to arbitration. Taking that date of April 3, 1990, this complaint is out of time says CPC.

The Board conducted a public hearing into this complaint on January 17, 1991 at Winnipeg, Manitoba.

II

The facts of this case are not in dispute. The complainant was employed by CPC at Brandon, Manitoba from May 1982 until he was fired on March 13, 1989 for alleged poor work performance. During his term of employment he was active in the union, holding various offices including President and

Vice-President of the Brandon Local. Immediately upon his dismissal the complainant initiated the grievance procedure under the collective agreement. All of the preliminary steps in the process were exhausted by June 22, 1989 without resolution and CUPW informed the complainant that his grievance would be referred to arbitration. Due to the backlog in the system, however, the complainant was told that his grievance would probably not be heard for a year at least.

The complainant testified that he had decided to take an electronics course which he commenced in September 1989. From time to time he checked with the union's regional office at Winnipeg and was informed that his grievance was still in the works and that it would be coming up for arbitration in due course. He was adamant that he had not been made aware by the union of any problem with the timeliness of his grievance until April 3, 1990 when he met with CUPW officials and the union's legal counsel at a pre-arbitration meeting. When he then inquired about the consequences of the timeliness issue being raised by the employer, the union officials down-played the seriousness of this preliminary objection. They were confident that the arbitrator would pay little heed to this objection and would proceed to hear the merits of the dismissal.

The union representatives who gave evidence before the Board corroborated that they had not informed the complainant about the timeliness issue affecting his grievance until April 3, 1990. Mr. Ken Bird, the union's regional grievance officer told the Board how he had taken over the responsibility for this particular grievance at the second level of the process and, having had no success in resolving the matter, he had, on July 12, 1989, forwarded the grievance to the union's

national office at Ottawa. Mr. Bird explained that this is normal procedure in these situations as it is the national level of CUPW which is responsible for deciding which grievances warrant referral to arbitration. The national office also notifies the employer which grievances are being referred. This is done by way of a computer print-out listing the numbers which are assigned to each grievance being referred to arbitration.

Mr. Bird testified that somehow the complainant's grievance never made it to the referral list, it just simply fell through the cracks in the system. When it was forwarded to Ottawa from the region it was included in a package of twenty-five or so grievances. The national office has no record of having received it. Apparently it was not until late 1989, probably December, when Mr. Gordon Fischer, a CUPW representative from the Prairie Region, who was dealing with another grievance, became aware that there was a problem with the complainant's grievance. Mention was made by CPC officials about other grievances which should have been dealt with prior to the grievance they were dealing with. The question of time limits was then raised by the employer. After a thorough check through the computer lists, Mr. Fischer realized that the complainant's grievance had not been processed at the national level. According to Mr. Bird, to the best of his recall, it was early January 1990 before he knew about the problem. Following discussions between the regional and national levels, it was decided to make a referral notwithstanding any timeliness problem. This they would face at arbitration. As a result, the complainant's grievance was referred to arbitration on February 7, 1990.

Arbitrator Ken Norman heard the grievance on April 4, May 14, and June 4, 1990. In a written award dated June 12, 1990

the arbitrator upheld the employer's preliminary objection about timeliness and dismissed the grievance as being inarbitrable. The relevant provisions of the collective agreement which speaks of time limits for referral of grievances to arbitration is article 9.30:

"9.30 Reference to Arbitration

When the Union decides to refer a grievance to arbitration, it shall notify the Corporation in writing. This notice shall be given not later than the thirtieth (30th) day after the union has received the reply of the Corporation at the final level of the grievance procedure.

The time limits stipulated in this procedure may be extended by mutual agreement in writing between the Corporation and the Union.

An arbitrator or arbitration board may extend the time for referring a grievance to arbitration, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party will not be prejudiced by the extension.

(emphasis added)

The arbitrator gave the following reasons for his refusal to exercise his discretion to extend the time limits:

"In light of the above balance I conclude, with regret, that the Union has not carried its burden of persuading me to the point of satisfaction that a sound basis exists upon which to exercise my discretion to extend the time-limit by five months. To again quote arbitrator Thomas Jolliffe in Re Gabriel this regret stems in part from the fact that this case '...involves the discharge of a long-service employee, who through no fault of his own faces a situation where the union which has carriage of the grievance throughout has rather inexplicably failed to meet its obligation regarding timeliness for referral to arbitration'. My statement of regret has also to do, in lesser part, with the rigid state of affairs which has come to exist between the parties to this collective agreement on the matter of timeliness. I do not applaud this development though I am a party to it. I have followed other arbitrators in authoring awards sustaining peremptory timeliness challenges by the Union. In reaching the distasteful conclusion that insufficient grounds exist for exercising my

discretion to extend the missed time-limit by five months I have been sensitive to the need for some fit to be made between this mandatory time-limit and others contained in the agreement. This has led me reluctantly to keep my Article 9.30 discretion under a rather tight rein."

(Re Dave Mullin and Canadian Union of Postal Workers and Canada Post Corporation, June 12, 1990 (Ken Norman, Ont.) at pages 10-11)

III

Dealing with CPC's argument about the timeliness of this complaint vis-à-vis section 97(2) of the Code, the employer tried to convince us that because of the complainant's union experience he should have been aware that the time limits under Article 9.30 had been missed when he did not receive his copy of a referral notice back in August 1989. Counsel for CPC questioned the complainant at some length about why he had not taken some action when the time limits were running out. In other words, CPC was inferring that the complainant has a responsibility to monitor the process. This same argument was rejected by Arbitrator Norman in his June 12, 1990 award:

"Mr. Gardner, for the Corporation submitted that another factor to be considered is the responsibility of the grievor to monitor the process. In this regard he relied on an observation in Re Sisters of St. Joseph (1982) 3 L.A.C. (3d) 222 (Brent) at 227, 228. I reject this proffered factor as having any bearing in this case. In Re Sisters of St. Joseph the reason for the delay was entirely due to the fault of the grievor who had mistakenly thought that the time began to run from the first day served of a three-day suspension rather than from the day when the suspension was imposed by the hospital. On the facts before me, Dave Mullin, through his Local, filed a timely grievance. Thereafter, carriage of the grievance was the responsibility of the union. The fact that Mr. Mullin had experience as a Local official does not alter this legal state of affairs.

No weight can properly be added to the Corporation's side of the scales due to the fact that the grievor took no step to question the Local, Regional or National offices of the Union about the status of his discharge grievance."

(Re Dave Mullin and Canadian Union of Postal Workers and Canada Post Corporation, supra, at page 5; emphasis added)

The Arbitrator was correct in our view and we reject out of hand any suggestion that the complainant had any onus whatsoever for the carriage of his grievance once he had filed the initial documents and had provided the union with all of the pertinent facts. Once filed, the grievance is the responsibility of the union. Keeping in mind that the union had told the complainant to expect a lengthy delay before his case would be heard and, each time he inquired about his grievance he was assured that it was still in the works, there is simply no foundation for CPC's suggestion that for the purposes of section 97(2) the complainant ought to have known about the missed time limit back in August 1989. That was before the union had knowledge of the problem and it was long before the employer had even twigged to the situation and raised its preliminary objection about timeliness.

For the purposes of section 97(2) we are satisfied that the complainant knew about the consequences of the union's conduct only when he learned of the Arbitrator's decision. It was at that time he knew that his opportunity for redress under the collective agreement against his dismissal had been negated by the missed time limit. There is nothing in the circumstances of this case which leads us to believe that he ought to have known prior to the arbitrator's award. We accept the complainant's testimony that he only learned about the employer's preliminary objection about the time limits

on April 3, 1990. However, this was at a pre-arbitration meeting; the hearing was starting the very next day. With the union's assurances that the preliminary objection was merely a technicality, which would in all likelihood be waived by the arbitrator, the complainant was surely not expected to run to the Board and file his complaint. It is our view that the complainant must receive the benefit of the doubt in these situations, therefore, it is our finding that the 90-day time limit under section 97(2) did not start to run until the complainant became aware of the arbitrator's decision which was some time between June 12 and June 20, 1990. The complaint is therefore timely.

IV

The two key issues before us are whether the circumstances surrounding the missing of the time limit can be found to be a violation of section 37 which speaks about arbitrariness, discrimination and bad faith and, even if such a violation can be found, does the Board have jurisdiction to use its remedial powers to set aside the arbitrator's decision and to order the grievance to proceed on its merits? CPC says that the answer to the second question clearly lies in the decision of the Supreme Court of Canada in Re Jean Gendron and Municipalité de la Baie-James [1986] 1 S.C.R. 401. In that decision the Supreme Court of Canada found in somewhat similar circumstances that the Quebec Labour Court could not use its duty of fair representation remedial powers to order an employee's grievance to be arbitrated when it had already been dealt with by an arbitrator.

We shall deal first with the question of whether a violation of section 37 has occurred. This Board has dealt with a few cases where time limits have been missed while a bargaining agent has been processing dismissal grievances. Whether this is a breach of the Code or not depends on whether the union's actions or inactions constitute gross negligence or simple negligence. In Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304), the full Board sitting in plenary session adopted the policy concept that simple negligence on the part of a bargaining agent does not create a breach of section 37 of the Code (then section 136.1).

"It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.

...

In keeping with the approach of labour relations boards in the United States, Ontario and British Columbia, we find simple negligence not to be a breach of the duty of fair representation (see Irving, supra; Walter Prinesdomy [1975] 2 Can LRBR 310 (O.L.R.B.); and Charles Morgan [1980] 1 Can LRBR 441 (B.C.L.R.B.)). Like the interpretations in those jurisdictions and the statutory expression in Quebec, discussed in Kenneth Cameron, supra, we do find seriously negligent conduct to be unfair representation. ...

(Brenda Haley, supra, at pages 324-325, 131-132, and 14,831; emphasis added)

Similar approaches by other provincial Boards and Courts in Canada and the U.S.A. were taken into account by the Supreme Court of Canada when it summarized the duty of fair representation in Canadian Merchant Service Guild et al. v. Gagnon et al. (1984), 84 CLLC 14,043:

"1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

...

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(page 12,188; emphasis added)

We have not reproduced paragraphs 2 through 4 of the Supreme Court's comments as they refer to a union's discretion not to proceed to arbitration with a grievance which is quite irrelevant to what we have before us here. It is not contested that CUPW had every intention to arbitrate the complainant's dismissal. The representation that is under scrutiny here is CUPW's handling of the grievance and in particular the conduct of the union which resulted in the time limits under the collective agreement being missed. For there to be a breach of section 37 of the Code, the conduct of the union officials who had the responsibility for the carriage of the complainant's grievance has to be found to be seriously negligent. Hostility, which was also identified by the Supreme Court of Canada as being a prohibited element is not a factor here, it was neither alleged or insinuated by the complainant.

Having had the benefit of hearing the testimony of Messrs. Bird and Fischer we have difficulty concluding that they were guilty of even simple negligence. They struck us as being extremely competent and their integrity is, in our opinion, beyond reproach. In fact, they appeared just as dumbfounded and frustrated as the complainant at the turn of events. In these circumstances where everyone involved was acting in good faith and where this grievance simply fell through the cracks, we can see no foundation to support a finding that CUPW breached its duty of fair representation. These things do happen even in the best of systems and at best, they can only be characterized as honest mistakes. There is ample authority in the voluminous writings on the duty of fair representation to establish that happenings such as honest mistakes, miscalculations or errors in judgement do not, in themselves, constitute a breach of the duty.

We are well aware of the severe consequences of the missed time limits for the complainant who has been deprived of the opportunity to have his dismissal arbitrated and we can sympathize with him. However, sympathy for the complainant is not grounds for the Board's intervention and the temptation to jump in because of adverse effects on a complainant must be resisted. The Board cannot allow itself to be drawn in merely because there is an apparent injustice. In a recent decision, Valerie Hertz et al. (1990), unreported CLRB decision no. 806, the Board made it clear that serious adverse effects on complainants is perhaps a reason to scrutinize the conduct of a bargaining agent more stringently, but it is not determinative of a breach of the union's duty of fair representation. In that case, three union members lost their jobs primarily because they had acted on advice from their bargaining agent which later turned out to be wrong. The Board dismissed the complaints

by the union members because it was satisfied that the union officials involved had not acted with any unlawful motives and had given the advice in good faith. Speaking about the adverse effects on the complainants, the Board said:

"... The Board has said often that we do not sit in appeal from decisions of union officials when dealing with section 37 complaints. Nor should the Board be swayed by the results or the impact of seemingly wrongful tactics or decisions by trade unions even if it means that persons such as the complainants in this case have been seriously adversely affected by such decisions. The Board must take itself beyond these often tempting and persuasive influences and look neutrally at the manner in which the decision was made. Absent unlawful motives, or seriously negligent conduct, the Board should resist the temptation to interfere."

(page 8; emphasis added)

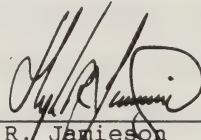
We agree and would add that the Board must be cautious to use its supervisory powers over the duty of fair representation to detect and remedy only abuses of exclusive representation authority by bargaining agents. This is the mischief sought to be caught by the legislation; it is not intended to be used to repair perceived defects in the system or to correct apparent injustices. This was clearly what was being said by the full Board in Brenda Haley, supra.

The underlying concern is, of course, the potential adverse impact of unwarranted Board intrusion in the collective bargaining process. If a union is to be found guilty of violating section 37 of the Code every time it misses a time limit in a dismissal grievance then what is the point of the parties negotiating these time provisions and including them in their collective agreements? In this particular case, an arbitrator has dealt with the missed time limits and sustained Canada Post's protection under the relevant provisions of the collective agreement. He did so after

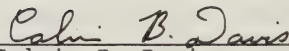
considering virtually the same circumstances which we have before us about the union's handling of the grievance and decided not to exercise his discretion under the collective agreement to waive the time limits. In these circumstances, it would be wrong in our opinion for the Board to use this complaint as an excuse (and it would be a flimsy excuse) to provide the union with a means to get around the arbitrator's ruling. Before the Board uses its extraordinary remedial powers to intervene in these situations to negate provisions in collective agreements which parties have negotiated in good faith, there surely has to be solid grounds for doing so. There are no such grounds here and the complaint is dismissed accordingly.

Having so decided, there is no need to address the issue raised by Canada Post about the Board's jurisdiction to make a referral to arbitration when a grievance has already been dealt with by an arbitrator.

The foregoing is a unanimous decision.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 18th day of February, 1991.

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Summary

TRANSPORT DRIVERS, WAREHOUSEMEN
AND GENERAL WORKERS' UNION, LOCAL
106 (TEAMSTERS), APPLICANT AND
DAMACO TRANSPORT INTERNATIONAL
LTÉE, ST. DAMASE (QUEBEC),
EMPLOYER

Board File: 555-2935
Decision no.: 853

Résumé de Décision

L'UNION DES CHAUFFEURS DE CAMIONS,
HOMMES D'ENTRÊPÔTS ET AUTRES
OUVRIERS, SECTION LOCALE 106
(TEAMSTERS), REQUÉRANTE, ET
TRANSPORT DAMACO INTERNATIONAL
LTÉE, SAINT-DAMASE (QUÉBEC),
EMPLOYEUR.

Dossier du Conseil: 555-2935
Décision n°: 853

This case involved an application
for certification of drivers
employed in the transportation of
goods by trucks. The contentious
issue consisted of the inclusion
in the bargaining unit, contested
by the employer, of owner
operators and of incorporated
owner operators.

The Board came to the conclusion
that all of these drivers were
dependent contractors and accord-
ingly, were employees under the
Code. As regards the effect of
incorporation, the Board lifted
the corporate veil in order to
arrive at its determination.

Il s'agissait d'une requête en
accréditation dans l'industrie du
transport de marchandises par
camion et visant les chauffeurs.
Le contentieux consistait dans
l'inclusion dans l'unité de négoc-
iation contestée par l'employeur
de chauffeurs propriétaires de
tracteurs et de plus de chauffeurs
propriétaires de tracteurs
incorporés.

Le Conseil a conclu que tous ces
chauffeurs étaient des contrac-
teurs dépendants et par consé-
quent, des employés au sens du
Code. En ce qui concerne l'inci-
dence de l'incorporation, le Con-
seil a levé le voile corporatif
pour en arriver à sa détermina-
tion.



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Reasons for decision

Transport Drivers, Warehousemen
and General Workers' Union, Local
106 (Teamsters),

applicant,

and

Transport Damaco International
Ltée, Saint-Damase, Quebec,

employer.

Board File: 555-2935

The Board was composed of Ms. Evelyn Bourassa and Mr. Robert Cadieux, Members, and Mr. Marc Lapointe, Q.C., Panel Chairman.

Appearances:

Mr. Robert Castiglio, for the applicant; and
Mr. Roger Bédard, I.R.C., for the employer.

These reasons for decision were written by Mr. Marc Lapointe, Q.C.

I

On March 31, 1989, Teamsters Local 106 (Teamsters) filed an application for certification to represent «all drivers within the meaning of the Labour Code, excluding office employees, mechanics and those automatically excluded under the Code» employed by Transport Damaco International Ltée (hereinafter Damaco).

In its initial reply to the application, Damaco claimed

that the sought after bargaining unit was not appropriate because its truck drivers belonged to three distinct groups.

1. owner-operators under a contract for services with Damaco;
2. incorporated owner operators who provide transport services on behalf of Damaco, "in accordance with contracts entered into between those corporations and Damaco";
3. drivers under "employment contracts" with Damaco.

And, according to Damaco, the owner-operators and the incorporated drivers are not employees within the meaning of the Code and should be excluded from the bargaining unit sought. The employer requested a public hearing *«at which the owner-operators and the companies under contract for services will themselves testify with respect to the nature of their business relationship with Damaco International»* (translation). The Teamsters deny Damaco's allegations and claim that the owner-operators and incorporated drivers are employees within the meaning of the Code.

On July 4, 1989, a senior labour relations officer of the Board completed his investigation and sent his report to the parties and to the Board.

The Board held a public hearing on August 14 and 15, 1989 in Montréal. Several witnesses were heard and additional

respective positions.

The Board deliberated on the matter and, on August 18, 1989, issued a decision pursuant to section 20 of the Canada Labour Code:

«20.(1) Where, in order to dispose finally of an application or complaint, it is necessary for the Board to determine two or more issues arising therefrom, the Board may, if it is satisfied that it can do so without prejudice to the rights of any party to the proceeding, issue a decision resolving only one or some of those issues and reserve its jurisdiction to dispose of the remaining issues.»

The Board's decision contained the following reservation:

«The parties will find attached hereto an order for certification issued by the Board. The Board reserves the right to amend the order at a later date, if necessary, in order to take into account its later decision respecting the owner-operators and one independent contractor.

When the Board issues that later decision, in addition to setting forth its specific reasons with respect to said owner-operators and the alleged independent driver, the Board will also issue the reasons for decision of its interim decision respecting the order attached hereto.»

(translation)

The order issued on August 16, 1989 read as follows:

«WHEREAS the Canada Labour Relations Board received from the applicant an application for certification as bargaining agent for a unit of employees of Transport Damaco International Ltée pursuant to section 24 of the Canada Labour Code (Part I - Industrial Relations);

AND WHEREAS, following an investigation into the application, consideration of the submissions of the parties involved and a public hearing, it appears to the Board that it may immediately, in accordance with section 20(1) of the Code, dispose of the issue of the certification of the salaried drivers of Transport Damaco International Ltée and only later dispose of the issue of whether the classifications of owner-operator and independent contractor should be excluded;

AND WHEREAS the Board, pursuant to its powers under section 20(1) of the Code, is satisfied that it may, without violating the rights of any of the parties to the proceedings:

- a) certify the applicant as bargaining agent for a unit of employees, as described below; and*
- b) reserve its decision on the issue of the exclusion of the other classifications that remain in abeyance; and*
- c) reserve the right, with respect to the description of the bargaining unit, to amend it after disposing of the remaining issue in dispute.*

NOW, THEREFORE, the Canada Labour Relations Board hereby orders that the Transport Drivers, Warehousemen and General Workers' Union, Local 106, be certified, and hereby certifies it, as bargaining agent for the unit comprising:

«all Transport Damaco International Ltée salaried drivers»

ISSUED at Montréal, this 16th day of August 1989, by the Canada Labour Relations Board.»

(translation)

These reasons for decision will complement the Board's decision in this matter.

II

As we have just seen, the Damaco salaried drivers were not in dispute. At the completion of the evidence, however, there were a number of persons the employer chose to characterize as «owner-operators» and one independent contractor, as the employer called him, who constituted the disputed issue between the parties, the employer claiming that these persons were not employees within the meaning of the Code, while the union claimed the contrary.

Almost all testimony related to this issue, and

supplemented the documentary evidence obtained by the Board, during its investigation or at the public hearing.

On April 17, 1989, at the request of the Board, Damaco supplied four lists (4) of persons who drive trucks.

1. full-time drivers, containing twenty-four (24) names.
2. part-time drivers, occasional drivers and/or those who have not completed their probationary period, containing nine (9) names.
3. driver under contract (contractual employee as designated by the employer), containing one (1) name - that of Hubert Carle, residing in Templeton, near Hull, Quebec (the alleged independent contractor).
4. list of corporate entities operating under contract (terms used by the employer), containing 11 items:
 - 1 - 152143 Canada Inc.
(address in Saint-Damase, Quebec)
 - 2 - Réal E. Boisvert Inc.
(address in Rougemont, Quebec)
 - 3 - Transport Gérald Lague Inc.
(address in Sainte-Madeleine, Quebec)
 - 4 - 161543 Canada Ltée
(address in Gracefield, Quebec)
 - 5 - 161683 Canada Ltée
(address in Aylmer, Quebec)
 - 6 - 754800 Ontario Inc.
(address in Osgoode, Ontario)
 - 7 - 136782 Canada Inc.
(address in Gatineau, Quebec)
 - 8 - Louis Rousseau
(address in Saint-Hyacinthe, Quebec)
 - 9 - Gilles Rousseau Sport Inc.
(address in Granby, Quebec)
 - 10 - 167131 Canada Inc.
(address in Magog, Quebec)
 - 11 - 167135 Canada Inc.
(address in Gatineau, Quebec)

During the course of the evidence, however, Damaco produced the following additional contracts it had entered into with the following corporations:

167150 Canada Inc. - Jean Rousseau

On April 24, 1989, a company designated as 167150 Canada Inc. was incorporated, indicating its place of business as being Saint-Hyacinthe, Quebec. The person in charge was Jean Rousseau. That name does not appear on any of the four (4) lists provided by the employer. On May 1, 1989, it purchased a truck from Damaco. All these events took place after the application for certification was filed.

161543 Canada Ltée - Denis Charbonneau

On April 18, 1989, a company designated as 161543 Canada Ltée was incorporated. Its head office was indicated as Gracefield, Quebec. The person in charge was Denis Charbonneau. That name does not appear on any of the four (4) lists provided by the employer.

167135 Canada Inc. - Bernard Cousineau

On April 24, 1989, a company designated as 167135 Canada Inc. was incorporated with a place of business in Gatineau, Quebec, by a driver by the name of Bernard Cousineau who, on April 28, 1989, purchased a truck from Damaco. His name does not appear on any of the lists provided by the employer. All these events took place after the application for certification was filed.

167131 Canada Inc. - Paul Boivin

On April 25, 1989, a company designated as 167131 Canada Inc. was incorporated, with its business address in Magog, Quebec. The name of the proprietor was Paul Boivin, trucker, who, on March 15, 1989, had signed a letter of intent to purchase a truck from Damaco and who in fact purchased said truck on May 5, 1989. His name does not appear on any of the lists provided by the employer. The important events in this instance took place after the application for certification was filed.

136782 Canada Inc. - Daniel Beauchamp

On May 20, 1988, a trucker purchased a truck from Damaco and, in addition, obtained from the province of Ontario a CAVR card to operate a truck. The person in question was named Daniel Beauchamp. His name does not appear on any of the lists provided by the employer.

161683 Canada Ltée - Serge LeBreton

This company was supposedly incorporated on April 28, 1988 and the name of the owner was Serge LeBreton. His name does not appear on any of the lists provided by the employer.

152143 Canada Inc. - Réal E. Boisvert

Mr. Boisvert apparently incorporated his business at the

end of 1988. However, we do not have the letters patent for that company. The company's head office is Saint-Damase, Quebec. This name appears on one of the lists provided by the employer.

167147 Canada Inc. - François Vaillancourt

On April 25, 1989, a company designated as 167147 Canada Inc. was incorporated. Its base was Sainte-Pie de Bagot and involved a trucker by the name of François Vaillancourt who appeared on the list provided by the employer at the request of the Board as an occasional part-time driver or one who has not completed his probationary period. Its place of business is indicated as being 1636 Main Street, Granby, Quebec. All these events took place after the application for certification was filed.

745800 Ontario Inc. - William Timothy Lowes

A company designated as 745800 Ontario Inc. appears to have been incorporated on March 2, 1988. Its head office was indicated as being on Donald Street in Osgoode, Ontario. The document reveals that the name of the principal owner was William Timothy Lowes. That name does not appear on any of the lists provided by the employer.

Gilles Rousseau Sport Inc.

On May 1, 1989, Gilles Rousseau Sport Inc. purchased a truck from Damaco and, on the same date, signed an owner-operator contract with Damaco. Sport Gilles Rousseau Inc. and Gilles Rousseau Sport Inc. had been incorporated on July 30, 1973. His son drives the tractor in and off season. His is quite a special case.

Transport Gérald Laque Inc.

Transport Gérald Laque Inc. was supposedly incorporated on December 22, 1983. This is all we know about it.

Carle Hubert

With regard to Carle Hubert, the record reveals that his place of business was 452 Murphy Street in Gatineau and he is described by the employer as being an independent contractor. He signed a so-called «owner-operator» contract with Damaco.

The union produced in evidence the following fact which was not contradicted. On March 31, 1989, Damaco distributed in writing the following memo to all its drivers:

«TO ALL EMPLOYEES

Further to some new perspectives and the reorientation of its markets, the Damaco Transport Group wishes to offer to all its employees the opportunity to acquire a truck to do local and long-distance transport.

The Damaco Group is also going to offer all interested persons with the required skills the opportunity to acquire its trucks, without, however, limiting the hiring of independent owner-operators.

The Management»

(translation)

Regular driver Denis Brodeur filed this memo (Exhibit 15) with the following handwritten annotation:

«I found this letter in my locker at work on April 3, 1989.

All drivers got one.

(Signed Denis Brodeur)»

(translation)

According to the evidence, this modest-sized company, engaged in transporting goods by truck under intra-provincial and extra-provincial transport licences, with a head office and terminal in Saint-Damase, Quebec, was carrying on its business prior to March 1989, insofar as trucks and drivers are concerned, using mostly full-time or part-time salaried truckers, but with some truckers who owned their own tractor to haul trailers for transporting goods who had incorporated companies under the corporate laws of Canada, Quebec or Ontario and, on March 31, with one tractor owner-operator who was not incorporated.

During the month of March 1989, the Teamsters solicited the Damaco drivers to unionize them. And during that month of March and in the ensuing weeks, Damaco greatly expanded its

policy of using incorporated truckers. Was this a coincidence or was it a move to circumvent collective bargaining or at least to undermine its establishment in the long run? In any case, the Teamsters have not filed a complaint of unfair labour practice on the part of Damaco, and the Board does not intend to pursue the matter. The Teamsters were content to file the above-quoted March 31, 1989 memo which Damaco sent to all its employees (Exhibit 15).

On the other hand, the Board has been in a position to observe over the past few years, especially since the deregulation of this industry by Parliament, the infatuation manifested by companies in this field with the use of an increasing number of truckers other than salaried truckers whom they have described as either independent contractors, brokers, lease operators, etc. It has been claimed and continues to be claimed that this formula allows the companies to be more competitive in an industry where competition has become fierce and is likely to become more so with the advent of free trade with our neighbours to the south.

Damaco perhaps quite genuinely opted for this formula around March 1989. It is not up to the Board to intervene in the administrative decisions of companies. However, it is up to the Board to ensure compliance with the provisions of the Code which the Board is responsible for applying with respect to contractors.

Section 3 of Part I of the Code entitled "Interpretation" contains the following definitions:

« *employee* » means any person employed by an employer; are included therein dependent contractors...

...

« *dependent contractor* » means

a) the owner, purchaser or lessee of a vehicle used for hauling, other than on rails or tracks, livestock, liquids, goods, merchandise or other materials, who is a party to a contract, oral or in writing, under the terms of which he is

(i) required to provide the vehicle by means of which he performs the contract and to operate the vehicle in accordance with the contract,

(ii) entitled to retain for his own use from time to time any sum of money that remains after the cost of his performance of the contract is deducted from the amount he is paid, in accordance with the contract, for that performance,

...

c) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that he is, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.»

In the case at bar, the employer submits that Carle Hubert is an independent contractor driver, and that all other drivers working for him and who are incorporated, are also independent contractors. Hubert and these other drivers, according to the employer, are not employees within the meaning of the Code.

The Board must therefore determine whether or not the contract and the working conditions of these drivers make them independent contractors and whether the mere fact that they are incorporated, although they signed the same owner-operator contract and are subject to the same working conditions, excludes the incorporated drivers from the scope of application of the Code.

It should be noted once again that Hubert as well as the

incorporated drivers signed what Damaco called an "owner-operator" contract, of which several samples were produced in evidence. They are all identical. The following is their full text.

«OWNER-OPERATOR CONTRACT

Contract entered into this ____ day of _____ 19..

Between: Transport Damaco International Ltée, a company duly incorporated under the laws of Canada and having its place of business at 255 Main Street, Saint-Damase, Que., J0H 1J0.
Hereinafter called the «Company».

and :

Hereinafter called the «owner-operator».

Whereas the Company is a public carrier using motor vehicles to haul goods and must from time to time call upon the services of independent owner-operators to haul goods in accordance with its operating licences;

And whereas the owner-operator certifies that he has the equipment, skill and expertise necessary for the proper operation of highway equipment;

Now therefore, in consideration of the commitments and understanding contained herein, the parties mutually agree to the following:

Term of the Contract

This contract shall come into force after the date of enforcement mentioned herein and shall remain in force for a period of one year effective upon the date of enforcement unless the contract is terminated ipso jure by mutual consent of the parties or in accordance with the provisions of this contract. This contract may be terminated by either of the parties giving the other party 30 days' written notice by registered mail. Failing such termination, this contract shall be renewed automatically and shall remain in effect until cancelled. As the Company is unable to guarantee a specific volume of work, a lay-off may be effected at any time without prior notice. In the event that such lay-off continues beyond thirty (30) days, either party may at any time terminate this contract without further notice.

Notice

For the purpose of this contract, notices shall be deemed to have been in fact given if given to one of the parties by registered

mail and shall be deemed to have been received on the second business day following the date of mailing. Notices may be sent to the Company by registered mail at 255 Main Street, Saint-Damase, Que., J0H 1J0, and to the owner-operator by registered mail at _____.

Breach of Contract

When the owner-operator is the driver of the equipment, he shall pay any fine imposed upon the Company when he infringes the Highway Code or any other law of the province or jurisdiction in which the equipment is used. In addition, the owner-operator shall pay any legal costs incurred in defending such charges. The owner-operator acknowledges that he knows the laws of the regions in which he operated in accordance with the Highway Code including, without restricting the generality of the foregoing, the weight, length and width limits, and all safety regulations contained in the laws, and that furthermore he is familiar with the conditions of operation set forth in the Company's operating licences.

Remuneration of the Owner-Operator

Attached to this contract and forming part hereof as Schedule «A» is a copy of the Company's salary scale. The payments made in accordance with the scale shall represent full and final payment for the performance of the services provided by the owner-operator in accordance herewith.

Remuneration for carrying out trips or hauling shall be paid on the 15th and last day of the month and such payments shall be two (2) weeks in arrears. If the 15th or last day of the month falls on a public holiday and/or a weekend, payment shall be made on the next following business day.

Company Rules

The owner-operator shall be subject to all rules established by the Company. Any change in the rules shall be made known to the owner-operator either with his statement of account or by registered letter which the owner-operator shall deliver to the address given by the owner-operator (see Schedule «B»).

Owner-Operator's Equipment

The owner-operator hereby agrees to supply and to make available for the purposes of this contract the transport equipment described in Schedule «C» for the exclusive use and operation by the owner-operator on behalf of the Company, for the term of this contract and in accordance with the provisions hereof.

The owner-operator agrees that, for the term of this contract, the use and operation of said transport equipment shall be entirely under the direction of Company dispatchers and shall be used for no other purposes.

The operation by the owner-operator of any transport equipment in addition to or in replacement of any of the equipment referred to in the said Schedule «C» shall be subject to the conditions of this contract, which additions or substitutions may only be made pursuant to an agreement between the parties.

The owner-operator understands and accepts that it is his responsibility as operator of said transport equipment to paint said transport equipment and to keep it painted in accordance with Company specifications, to affix and to keep affixed the symbols, signs or other forms of identification which are from time to time stipulated by the Company, and no others. When said transport equipment is withdrawn from the service of the Company, whether at the end of this contract or otherwise, the owner-operator shall immediately remove, at his own expense, the above-mentioned symbols, signs and identification.

The owner-operator shall maintain and repair said equipment at his own expense and keep it in good working order and repair. The owner-operator shall provide all safety equipment, such as a fire extinguisher with a minimum 10 B.C. capacity, reflector triangles, warning flares, first aid kits, etc.

The owner-operator shall warrant that he has completely complied with any periodic maintenance, repairs, replacement of parts and regular inspections required by any authority having jurisdiction over the operation of equipment or required under the terms of any appropriate insurance policy covering the equipment, all at the expense of the owner-operator.

All front tires of motorized transport equipment shall be replaced when no more than 20% of the tread remains and no recapped tires or other repairs shall be permitted on said front tires.

The Company requires that the owner-operator provide a safety inspection certificate for his equipment at least once a year. Points that must be specifically mentioned are the condition of the brakes, tires, gearbox, steering pivot, coupling bars, air compressors, wheel alignment, fifth wheel (shoe and mounts). Such inspection shall be made by a certified garage licensed to do this type of inspection.

The owner-operator shall allow the Company at all times to inspect his equipment.

The owner-operator shall ensure that all said equipment is kept duly washed and clean in accordance with Company policy.

The Company's Equipment

The owner-operator shall use the Company's semitrailers to carry out the obligations hereunder.

The Company shall ensure that each of the semitrailers provided is in working order when the owner-operator takes possession of it.

The owner-operator shall inspect all semitrailers owned by or in the legal possession of the Company and shall refuse to accept any semitrailer that is not in working order. Where the semitrailer is accepted by the owner-operator for transporting goods, the owner-operator shall be deemed to have inspected the semitrailer and the latter shall be deemed to have been in working order when the owner-operator took possession of it. The owner-operator shall act with care and caution in the use of semitrailers provided by the Company and shall return them to the custody and control of the Company at the end of each trip in as good condition as the owner-operator received them (provided, however, that the owner-operator shall not be responsible for normal wear and tear or damage caused to the semitrailer other than that due to his negligence or recklessness).

For purposes of clarification, and without restricting the generality of the foregoing, periodic inspections of the semitrailer's tires should be carried out by the owner-operator, at the intervals specified from time to time in Company rules and procedures. The owner-operator shall be responsible for the replacement cost of the casings and for the approximate value of the remaining tread life of a tire destroyed through the owner-operator's negligence. The owner-operator shall be deemed negligent where a tire is destroyed as a result of being driven on when flat. The Company shall be responsible for normal wear and tear of the tires on the semitrailers it provided and shall reimburse the owner-operator for flat tire repairs and the costs of replacing «blow-outs», provided that the owner-operator gives reasonable evidence of the costs of such repairs and replacements and returns the casing and inner tube of any tire so replaced.

The expression 'working order' used in this section shall mean the equipment that complies with all regulations, laws and public orders, and with all safety and other requirements under any insurance policy in effect covering the equipment.

The owner-operator shall inspect and note any damage or defect on any semitrailer provided by the Company before taking possession thereof, and shall report any damage or defect to the Company dispatcher before taking possession of said semitrailer. The owner-operator shall be deemed to have made a complete inspection of any semitrailer provided by the Company and of which he takes possession, and the owner-operator shall be responsible for any damage or defect not reported to the Company dispatcher.

Duties of the Owner-Operator

The owner-operator understands and accepts that, as operator of said transport equipment, he is responsible for performing all duties arising out of the use of said equipment, including supervising the loading and/or unloading of the semitrailers and containers transported by the owner-operator, and for complying with the rules, procedures and requirements set forth in Company rules and procedures.

The owner-operator agrees to carry out a complete inspection of all goods received for transport and to take down clear and complete information regarding any damage, exceptional circumstances or irregularities that may be visible or of which he is aware, which information or observations he shall report forthwith to the Company.

The owner-operator agrees to obtain proof of delivery of the goods, in the manner determined by the Company. Where an exceptional circumstance, damage or an irregularity is noted, at the time of delivery, the owner-operator shall be responsible for advising the Company forthwith and for providing in writing a complete report in respect thereof as soon as possible; this report shall be in accordance with the manner determined by the Company in its rules and procedures.

Eligibility of Drivers

The owner-operator shall ensure that only drivers who have been approved by the Company and who have passed all medical examinations and driving skills examinations required from time to time by the Company, are authorized to operate the transport equipment in accordance with this contract.

Financial Liability

Where the Company grants credit to the owner-operator or supplies gasoline, diesel fuel, oil and/or any other product and/or parts, the owner-operator shall be charged for such services, parts and/or products and such charges shall be deducted from his income. The Company does not assume any liability towards the owner-operator or third parties for any services, material, parts or repairs supplied to the owner-operator and the owner-operator agrees to indemnify and hold harmless the Company against any claims arising therefrom.

The owner-operator shall not make a commitment of credit on behalf of the Company or undertake liabilities in the name of or on behalf of the Company.

The Company may, at its option, pay or pay off an amount due and secured by any possessory right, lien, preference or legal claim, mortgage, conditional sales agreement or any preference, lien or charge, of any type or kind relating to the transport equipment or the use or the ownership thereof and may deduct such amount from the owner-operator's remuneration and, if insufficient, from the hold-back of money in its possession.

Insurance and Liability

The parties agree that the owner-operator's commercial vehicles will be insured through the Company. The insurance policy shall cover loss caused by fire, theft, and collision to the commercial vehicle as well as third party liability arising out of the use of the vehicles during the performance of Company business. This insurance shall be cancelled as soon as the owner-operator ceases to work for the Company. Any credit and/or refund of premium by the insurance company shall go to the Company. A copy of the insurance policy is attached (Schedule «D»).

It is understood that the Company shall pay the insurance premiums upon issuance of the policy. The owner-operator shall assume part of the costs in accordance with the method set forth in Schedule «A» (Remuneration of the Owner-Operator). It is also understood that the owner-operator shall bear all costs required by the insurance company for an insured market value of the vehicle above \$84,000.

The basic insurance policy includes the following coverage in the event of loss.

Chapter/Section A - coverage \$2,000,000 -
deductible \$1,000

Chapter/Section B - all risks and perils
deductible \$5,000

It is understood that the deductibles are the responsibility of the owner-operator, such sum being subject to deduction by the Company from all amounts due to the owner-operator.

Any transport claim shall be the responsibility of the Company unless the loss claimed took place and was caused through the negligence or wilful misconduct of the owner-operator.

The Company shall act as the owner-operator's representative in settling any supplementary insurance claim made by the owner-operator.

The owner-operator shall co-operate fully in settling, defending and pursuing any insurance claim.

The proceeds from any insurance claim received by the Company shall be held in trust by the Company for the owner-operator and shall be subject to:

- a) any right of compensation of the Company.
- b) any preference interest of which the company is aware.
- c) any expense incurred by the Company in respect of the recovery of such insurance claim proceeds.

The owner-operator shall immediately advise the Company and its insurers of any accident or event, irrespective of fault, involving property damage or personal injury during the performance of this contract. If the owner-operator does not so advise the Company and its insurers, the Company shall hold him the only one responsible for any damage that the Company may have to pay, and the owner-operator agrees to indemnify the Company in respect thereof.

Expenses and Indemnification of the Owner-Operator

With the exception of the specific exclusions hereunder, all direct and indirect costs and expenses in connection with the performance of the owner-operator's obligations and the operation of the owner-operator's equipment shall be at the expense of the owner-operator and the owner-operator shall indemnify the Company against any claim in connection therewith, including, but without restricting the generality of the foregoing:

- a) salaries, including vacation pay, employer Canada Pension Plan contributions and unemployment insurance, and taxes deducted for the representatives and employees of the owner-operator.
- b) fees, assessments, fines and registration costs.
- c) all oil, fuel, tires, repairs, fines, licence plates and other expenses related to the operation of the transport equipment.
- d) any deductions through a group insurance plan of which the owner-operator is a member through the Company.

Compensation for Work Injury

The owner-operator shall be responsible for all Workmen's Compensation Boards levies, imposed by any competent authority with respect to the application of this contract.

The owner-operator shall be registered as an employer with the Workmen's Compensation Boards, in any applicable jurisdiction and shall pay all necessary contributions in his name and that of his employees and shall provide proof thereof at the Company's request.

Operating and Commercial Licence

It is agreed and understood that the owner-operator shall pay for all vehicle licences for Quebec, Ontario including C.A., New Brunswick and Nova Scotia at the weight determined by the Company.

The Company agrees to provide to the owner-operator all fuel stickers for the province of Ontario. The Company agrees to provide to the owner-operator all fuel stickers, appropriate licences, Bingo card and/or any other licence to travel legally in the United States, in connection with the Company's operations.

All licences, registrations, fuel permits, licence plates and other licences and authorities and authorizations provided by the Company shall remain the Company's property and shall be returned to the Company at the end of the contract.

Remuneration Deductions

The owner-operator hereby authorizes the Company to hold back the sum of \$5,000. from the remuneration otherwise payable to the owner-operator, as security for the payment by the owner-operator of any advance or other indebtedness payable by the owner-operator to the Company. This deposit of \$5,000. shall be accumulated by the Company through a hold-back of 10% of the remuneration payable to the owner-operator by the Company for the first \$2,500. and through a hold-back of 5% for the second \$2,500.. An annual interest rate of 10% shall be paid to the owner-operator on that hold-back, from the date upon which the amount of either part of the hold-back is accumulated in full and no amount remains owing to the Company. The interest shall be paid within forty-five days (45) of the anniversary of the contract.

The provisions of this contract shall in no way relieve the owner-operator from paying to the Company all costs and expenses, advances or monies payable by the owner-operator to the Company.

At the end of this contract, full settlement of all amounts payable, including the application of the hold-back, shall be made within ninety days (90) after the date of closing; the balance of any hold-back remaining shall then be paid to the owner-operator at that time.

In the event that the owner-operator cannot complete a trip due to mechanical break-down, the owner-operator shall be paid the full amount of remuneration for the trip as if it had been completed, but there shall be deducted all expenses incurred by the Company in order to complete the trip and to deliver the goods in place of the owner-operator.

Logbooks, Reports, Damage Claims and Compliance with the Law

The owner-operator agrees to comply fully with all appropriate regulations, statutes, directives and orders promulgated by the public authorities having jurisdiction over the conduct of the parties for the performance of this contract.

The owner-operator agrees to prepare and file with the Company the logbooks, kilometrage reports, fuel receipts and any other documents required by the Company under its rules and procedures.

The owner-operator agrees to advise the Company of all accidents, transport claims, violations and alleged violations of any

regulations, statutes, directives or public orders as required under Company rules and procedures.

The owner-operator agrees to deal quickly with any and all offenses committed by the owner-operator against any public law during the course of the operation of the transport equipment in accordance with the terms hereof, and the owner-operator further agrees to indemnify the Company for the expenses and fees incurred for the defence of claims or actions related to such offenses or the payment of fines related thereto.

Scope of Mandate

The owner-operator is not and shall not hold himself out to be the agent of the Company except for the purposes of signing bills of lading or on the express authority of the Company.

The owner-operator shall not make representations with respect to delays in transport, time of delivery of the goods or dates or means of delivery without first obtaining the express approval of the Company and making a clear notation thereof on the front of the appropriate bill of lading.

The parties hereto agree that the independent owner-operator is providing a service in accordance with this contract as an owner-operator and not as an employee, partner in a «joint venture» with the Company.

In the event of termination or discontinuation of this contract within the meaning of this section, the owner-operator acknowledges that he has given prior authority, upon the signature hereof, to the Company to advise the Quebec Transport Commission.

Amendments or Transfer

This contract may be amended from time to time with the consent of the two parties whose signatures appear herein subject to the Quebec Transport Commission being advised thereof.

This contract shall not be transferable without the consent of the other party hereto.

Representations and Warranties

The owner-operator expressly acknowledges that the Company has made no representations or warranties with respect to the quantity of goods to be transported or the income or total profit or other remuneration to be received by the owner-operator for the term of this contract or portion thereof. The owner-operator also acknowledges and agrees that the Company has made no representations or warranties respecting the number of trips to be made over the term of this contract, the capacity or the weight of the semitrailers to be transported, the total kilometrage to be covered, or the frequency or suitability of dispatches in his favour, and the owner-operator acknowledges and agrees that all decisions concerning the use of the owner-operator's equipment are within the Company's entire discretion.

The parties hereto agree that this contract and its schedules constitute their entire contract and that there are no other additional contracts, representations or warranties and that all the rights and obligations of the parties shall be governed by this

contract, notwithstanding any commercial norms or any previous contract, written or oral.

Nullification of the Contract

In the event of the adoption or later promulgation of any regulation or statute of Transport Canada or of any authority having jurisdiction over the performance of this contract, the effect of which is to nullify this contract or prevent its performance, the contract or that part of the contract which becomes illegal or prohibited shall be immediately terminated and shall no longer be in force nor have any effect.

Legislation in Force

This contract shall be governed by the laws of the province of Quebec.

Miscellaneous

Where a section or a part of a section of this contract is deemed unenforceable or invalid, the remainder of this contract shall not be affected and that unenforceable or invalid section or part thereof shall be deemed to be withdrawn from the contract which shall remain in force for the remainder of the provisions hereof which shall not be affected.

No waiver or indulgence granted by the Company of the strict compliance with the responsibility or obligations of the owner-operator hereunder shall be construed as or considered a waiver by the Company of its rights to enforce compliance with and strict performance of each and every obligation and responsibility of the owner-operator in the future.

Non-Competition

The parties agree that for a period of three (3) years following the termination of this contract for any reason whatsoever, the owner-operator or any other person or corporation, either directly or indirectly, shall not solicit the Company's business in the field of highway transport of goods for remuneration from any of the Company's customers with whom the broker does business during the period of this contract with the Company.

WITNESS

OWNER-OPERATOR

WITNESS

TRANSPORT DAMACO INT. LTÉE
Per:

_____ »

(translation)

N.B. The above constitutes the entire text of the contract.

The following are the remarks that the Board believes it should make following its review of this contract.

1. Page 1. It is not because Damaco calls the persons or corporations independent owner-operators, or because those persons or corporations by signing the contract agree to that title, that they are in fact independent contractors.

2. Page 1. *«Since the Company is unable to guarantee a specific volume of work, a lay-off may be effected at any time without prior notice.»* One does not lay off a corporation. One lays off an employee and one terminates a contract.

3. Page 1. «Breach of Contract»

Why would the fine be imposed on Damaco if the owner of the tractor is independent?

4. Page 2. «Company Rules»

«The owner-operator shall be subject to all rules established by the Company.» We will come back to this rule later when we see that it is an integral part of the owner-operator contract as Schedule «B». And the evidence revealed that this was the same rule as the one that applies to salaried drivers.

5. Page 2. «Owner-Operator's Equipment»

First, we see that the owner-operator or «independent» contractor or driver agrees to make available his tractor for the exclusive use and operation of Damaco.

Next, the owner-operator corporation or independent contractor or driver agrees to two things:

1) The use and operation of his tractor (Schedule «C») are entirely under the direction of Damaco dispatchers;

2) His tractor shall be used for no other purposes than those of Damaco.

6. Page 3. 1) The owner-operator accepts that it is his responsibility to keep his tractor painted in accordance with Damaco specifications. He must affix and keep affixed the symbols, signs or other forms of identification which are, from time to time, stipulated by Damaco, and only those. At the end of the contract, he must immediately remove those symbols, signs and identification at his own expense.

2) The owner-operator must ensure that his tractor is kept «duly washed and clean» in accordance with Damaco policy.

3) The owner-operator must use Damaco's and

only Damaco's semitrailers to effect his trips.

7. Page 4. 1) The owner-operator is responsible for supervising the loading and/or unloading of the semitrailers and containers he transported and, in this regard, must comply with the rules and procedures and requirements set forth in company rules and procedures.

2) The owner-operator agrees to advise the company in writing of any damage or irregularity in a delivery of goods in accordance with the manner determined by the company in its rules and procedures.

8. Page 5. 1) The owner-operator does not have exclusive choice of the drivers who drive his tractor since only drivers approved by the company may drive.

2) The owner-operator's tractor is insured through the company. In fact, it is the company's insurance: the owner-operator has no choice. That insurance is cancelled as soon as the owner-operator *«ceases to work for the Company»* and any credit and/or refund of premium by the insurance company goes to the company, even though the owner-operator assumes a portion of the premiums. (See Schedule A of the contract, item J): *«The Company shall deduct an amount of \$0.05 per mile for insurance.»*)

3) The company acts as the owner-operator's representative in settling any supplementary insurance claim by the owner-operator.

9. Page 6. «Expenses and Indemnification of the Owner-Operator»

After establishing that all direct and indirect costs and expenses in connection with the performance of the owner-operator's obligations and the operation of the owner-operator's equipment are at the expense of the owner-operator, the contract proceeds to add that the owner-operator must indemnify the company against any claim in connection with:

a) salaries, including vacation pay, employer Canada Pension Plan contributions and unemployment insurance *«and by withholding taxes applicable to the representatives and employees of the owner-operator».*

Which employer? Who then is the employer?

b) fees, assessments, fines and registration costs

...

d) any deduction through a group insurance plan of which the owner-operator is a member through the company

10. Pages 6-7 «Operating and Commercial Licence»

We note that all licences, registrations, fuel permits, licence plates and other licences, authorities and authorizations provided by the company remain the company's property and must be returned to the company at the end of the «contract». (In French, the term «convention» was used.) It no doubt meant to say «at the end of the contract», since it is a contract.

Page 7. 1) «Salary Deductions»

We would note the severe financial restrictions imposed on the owner-operators considering that the evidence revealed that the tractors purchased from Damaco created a heavy financial burden on those drivers.

2) «Logbooks...»

The owner-operator agrees to prepare and file with Damaco his/her logbooks and mileage reports. In Schedule A, where the terms and conditions of the owner-operator's remuneration are set forth, he is paid by the mile. He must also submit fuel receipts, all in accordance with company rules and procedures.

11. Page 8. «Scope of Mandate»

One might question the point of using the word «mandate» in such circumstance. We note that the owner-operator is prohibited from making any representation whatsoever to the customers with

respect to delays in transport, time of delivery of the goods or dates or means of delivery without first obtaining the express approval of Damaco.

12. Page 8. «Representations and Warranties»

The owner-operator acknowledges that Damaco has given him no warranties with respect to the number of trips to be made over the term of the contract, the capacity or the weight of the semitrailers to be transported, the total kilometrage (once again) to be assigned or the frequency of dispatches in his favour and the owner-operator acknowledges that all decisions concerning the use of the owner-operator's equipment (that is, his tractor) are within Damaco's entire discretion.

13. Finally Page 9. «Non-Competition»

The owner-operator agrees that for a period of three years following the termination of the contract, «the owner-operator or any other person or company», either directly or indirectly, shall not solicit Damaco's customers with whom (and here suddenly the following word is used) the broker does business during the period of the contract.

Attached to this owner-operator contract, we find in Schedule «A» the following text:

« Schedule «A»

Remuneration of Owner-Operator

A) Long distance - mileage rate

1. The owner-operator shall be remunerated at the rate of \$1.03 per mile where charged. The miles paid for shall be those recognized by the «Household Carriers Bureau Mileage» chart; the July 13, 1985 guide shall be the point of reference in case of dispute.
- B) The owner-operator shall be remunerated at the rate of \$0.88 per mile from the point of unloading to the point of loading on the return trip.
- C) The owner-operator shall be remunerated at the rate of \$0.75 per mile for the tractor only from his home base to another terminal.
- D) For loads from 55,000 to 70,000 lbs. =
\$0.07 per mile in addition to the basic rate
- E) For loads of 70,000 lbs. or more =
\$0.08 per mile in addition to the basic rate
- F) Lay-over - none. In the case of very special situations, the amount shall be negotiated depending on the situation.
- G) Waiting time: after 18 hours, paid on the basis of \$10.00 per hour, to be approved by the dispatcher before the hours are completed.
- H) Gasoline and/or highway taxes are at the Company's expense, however the owner-operator shall purchase fuel oil in each state in accordance with the mileage travelled in each state, and, if not, the difference will be charged back to him.
- I) Fuel rebate - property of the Company. It is understood that tax refunds on the purchases of fuel by the American states and/or the Canadian provinces form an integral part of the owner-operator's remuneration; it is agreed that such refunds remain the property of the Company. It is also agreed that the Company shall prepare the necessary reports for obtaining such refunds and that the owner-operator agrees to sign such reports where required.
- J) The Company shall deduct an amount of \$0.05 per mile for insurance.
- K) The owner-operator retains his level of seniority as a driver.»
- (translation)

Regarding Schedule «A», the Board's attention is drawn to paragraphs H), I) and K), which are quite revealing.

- H) The owner-operator is not free to purchase fuel where he pleases.
- I) The refunds on fuel purchased and paid for by the owner-operator from certain American states or provinces remain the property of Damaco.
- K) And all of a sudden again, we find the quite extraordinary notion in a contract entered into by two independent legal entities: «The owner-operator retains his level of seniority as a driver».

There is also a Schedule «B» which contains the Damaco rules that the "owner-operator" must accept.

« SCHEDULE «B»

Rules

- 1 - Not accept passengers without the express authorization of the Company in order to comply with insurance regulations.
- 2 - Not consume drugs, alcoholic beverages or illegal stimulants while on duty or will be subject to an immediate termination of the contract.
- 3 - Provide to the Company a copy of driver's licence at the beginning of this contract.
- 4 - Pay the fines due for offenses under the Highway Code of any state or province or this may result in the termination of the contract, at the Company's discretion.
- 5 - Complete all transport documents required.
- 6 - Remit proof of delivery, the original bill of lading, the customs stamped copy of the freight control document, the route sheets duly completed, the fuel report and the fuel purchase receipts before being paid, complete the log-books.
- 7 - Pay bridge and highway tolls and will be reimbursed by the Company for authorized tolls.
- 8 - Undergo the examinations required by the 'Motor Carrier Regulation of the Federal Highway' as well as a highway test at own expense.
- 9 - Have at all times a certificate of medical examination no more than two (2) years old and a certificate of a written

examination and a copy must be remitted to the Company.

- 10- Advise the Company dispatcher forthwith of a breakdown, accident or trailer out of service.
- 11- Advise the Company dispatcher forthwith if unable to effect the transport and delivery in accordance with the bill of lading.
- 12- Quickly report in writing the details of any accident on the forms provided by the Company.
- 13- Pay all costs or expenses incurred by the Company to complete a delivery or to take possession of a load for the purpose of helping the owner-operator deliver the shipper's goods to the consignee.
- 14- Pay for any loss or damage caused to the struts, joist, crossbars, tires or any additional repairs made to the Company's equipment if caused by the negligence of the owner-operator or his employees.
- 15- Always check the tires, lights and general condition of the equipment assigned. Where defects are noted, fill out an equipment control report.
- 16- Remove any accessory that represents a danger to the driving of the truck.
- 17- The Company will make every effort to dispatch the loads in a fair and equitable manner. The dispatcher has been asked to try to avoid assigning all loads involving difficulties to the same operator. This being said, we hope that the drivers will accept trips that are difficult as well as those that are considered easy. An operator who systematically refuses difficult loads runs the risk of having his contract cancelled.
- 18- Once the pick-up is complete, the contractor must without fail report to the destination terminal at the times indicated by the Company. Failures to comply with this rule may create difficulties between the operator and the Company. The Company is aware of the problems that the operator may experience and will excuse non-compliance with the rule if valid reasons are given. Operators who are consistently late without satisfactory reasons could have their contract cancelled.
- 19- The owner-operator agrees to install a tachometer at his expense and maintain it in working order.
- 20- The owner-operator shall observe the speed limits set by the Company and/or the government limits.
- 21- The owner-operator shall respect the Company's customers; excessive rudeness may lead to cancellation of the contract.
- 22- The owner-operator shall take care of his appearance and wear clean clothes. Those without beards must shave regularly.
- 23- The owner-operator must report every day between 7:00 a.m. and 10:00 a.m., and between 4:00 p.m. and 7:00 p.m.»

(translation)

We draw attention to paragraphs 17), 18), 19), 22) and 23).

By paragraph 17), we understand that the owner-operator or alleged independent contractor does not have the independence to refuse «difficult» loads.

In paragraph 18), we find the words «failures to comply with this rule may create difficulties between the operator and the Company».

One might wonder how the existence of a tachometer enhances the independent status of the «owner-operator» in paragraph 19).

The imposition on the owner-operator in paragraph 20) raises the same question.

Paragraph 22) makes one wonder.

As to paragraph 23), it oddly resembles the conditions of availability that any employer imposes upon its employees.

The owner-operator contract also includes a Schedule «C» which constitutes the description of the owner-operator's tractor.

«

SCHEDULE «C»

Description of Truck

UNIT #	_____
OWNER-OPERATOR	_____
COMMENCEMENT OF SERVICE	_____
BASE TERMINAL	_____
MAKE	_____

MODEL _____
YEAR _____
SERIAL # _____

TOTAL LOADED WEIGHT _____
MOTOR # _____
PLATE # _____
PROVINCE _____

Initials _____

_____»

(translation)

Finally, the same contract contains a Schedule «D» which is a copy of «the insurance provided by the company», that is Damaco.

III

It should be added that the tractor described in Schedule «C»" was either the owner-operator's property when the owner-operator contract was signed or was the subject of a purchase by the owner-operator of a tractor from Damaco at the time of his incorporation. Thus, the tractor purchased in this way is the one described in Schedule «C».

The following is an example taken from the evidence in the case at bar and involving an owner-operator whose name we shall not reveal.

On March 15, 1989, we find an intent to purchase.

«March 15, 1989

I hereby confirm my intention to purchase a 1989 Mack Truck - unit
...

Serial no.

Value of truck \$80,000. Financed over 3 years
Balance \$25,000

Other Financing

Federal registration \$1,000
Plate 1,878

Financed over 8 months \$2,878

42" Sleepers
AM/FM radio and cassette

I retain my level of seniority.

I will sign the purchase contract and the owner-operator contract
when the latter becomes available.

Signature _____ (owner-operator)

_____ on behalf of
a company to be incorporated.

Signature _____ (company)
Transport Damaco Int'l Ltée»

(translation)

We are talking about a tractor owned by Damaco here.

On May 5, 1989, the following purchase contract was
concluded, putting into concrete form the intent to
purchase, preceded by another contract:

«Saint-Damase, May 5, 1989

In consideration of the payment by TRANSPORT DAMACO INT'L LTÉE of
the cost of registration of the truck and the expenses of
incorporating the company XYZ Canada Inc., we hereby agree to pay to
TRANSPORT DAMACO INT'L LTÉE the sum of two thousand eight hundred
and seventy-eight dollars bearing interest at the rate of fifteen
per cent (15%) per year before and after the due date of each
payment and payable in equal, consecutive monthly instalments of
(\$359.75) three hundred fifty-nine --75/00 dollars each, the first
such instalment to be made on or before the first day of June 1989.

Per: _____

Incorporation expenses:	\$ 1,000.00
Registration costs:	<u>\$ 1,878.00</u>
	<u>\$ 2,878.00</u>

AGREEMENT

MADE AT Saint-Damase, Que., this 5th day of May 1989

BETWEEN

TRANSPORT DAMACO INTERNATIONAL LTÉE, a duly incorporated company having its registered office and principal place of business at Saint-Damase, Quebec, herein represented by and acting through its Secretary, Mr. Raymond Laliberté, duly authorized by resolution of the directors of the Company adopted the 24th day of April 1989.

Hereinafter called: «THE VENDOR»

AND

X.X.X.X.X.X.

A duly incorporated company having its registered office and principal place of business at Magog, Quebec, herein represented by and acting through its President, Mr., duly authorized by resolution of the directors of the Company adopted the 5th day of May 1989.

Hereinafter called: «THE PURCHASER»

THE PARTIES HEREBY AGREE TO THE FOLLOWING:

1.0 OBJECT OF THE CONTRACT AND DESCRIPTION OF EQUIPMENT SOLD

1.1 The VENDOR hereby sells to the PURCHASER, who hereby accepts, all subject to the terms and conditions hereof, the equipment described below with the accessories attached thereto, namely:

- Make: Mack
- Model: R.....
- Serial Number:
- Make and number of motor: Mack E.. - ... - ...
- Registration for the current year: XX
- Year of Vehicle: 1989
- Mileage on the Odometer as of:
- New or used: new
- Name of manufacturer: Mack Canada Inc.
- Other details and comments:

Including - AM-FM radio and cassette
- Maska 42" truck sleeper
- Front Tires XZA-1
- installed, balanced and aligned

- 1.2 The PURCHASER acknowledges that he has seen and examined the equipment and also acknowledges that he has had the opportunity to have the vehicle examined by an expert of his choice: the PURCHASER also acknowledges that the equipment which is the subject of this sale is fit, as to its capacity, dimensions and all other respects, for the purposes for which it is intended and that it can be used for the normal service for which he intends it; the PURCHASER further acknowledges that he has received the equipment in good condition. It is, for greater clarity, agreed and understood by the parties that there is absolutely no warranty of any nature whatsoever on the part of the VENDOR concerning said equipment which is governed only by the manufacturer's warranty; a copy of which documents is attached hereto and forms an integral part hereof as if recited here in full.

2.0 PRICE

- 2.1 This sale is made for and in consideration of the sum of eighty thousand ----- dollars which the PURCHASER agrees to pay to the VENDOR at its address mentioned in the heading hereof in the following manner: no down payment _____

The balance, namely the sum of eighty thousand dollars (\$80,000.) shall bear interest at the rate of FIFTEEN percent (15%) per year before and after the due date of each instalment and payable in thirty-five (35) equal and consecutive monthly instalments of (\$2,219.09) two thousand two hundred nineteen...09/00 dollars each and a final instalment of twenty-six thousand eight hundred eighty-three 19/00 dollars. The first of such instalments to be made on or before the first day of June 1989 (see repayment schedule attached).

- 2.2 It is fundamental to this contract that the VENDOR be and remain owner of the equipment which is the subject of this sale until full and final payment of the purchase price. In the event of a default on the part of the PURCHASER, the VENDOR shall have the right to take immediate possession of the equipment which is the subject hereof or of this sale, without notice, reserving all its other rights and remedies.
- 2.3 The PURCHASER may at any time during the term hereof repay, in whole or in part, in advance and without penalty, any balance due hereunder or any part of such balance, provided however that such repayment shall not be for an amount less than the equivalent of a monthly instalment of the principal.
- 3.0 The PURCHASER hereby expressly authorizes the VENDOR to withhold from the monies that the VENDOR may owe to the PURCHASER from time to time, any sum due by the PURCHASER to the VENDOR hereunder or on some other account and to pay itself accordingly. It is nevertheless understood that, insofar as and as long as the PURCHASER is not in default under the terms of this contract, the VENDOR shall only withhold an amount sufficient to cover the monthly instalments and expenses related to the operation of the equipment as

agreed between the parties.

4.0 RISK OF LOSS, USE AND MAINTENANCE

- 4.1 The PURCHASER shall be responsible for any loss or damage to the equipment, however caused and of any nature whatsoever, and he shall act in that capacity as if he were the absolute owner of the equipment subject of this sale. In the event of loss, damage, destruction or confiscation of the equipment, the PURCHASER shall not, as a result thereof, be relieved of its obligations under the provisions hereof and, without restricting the generality of the foregoing, shall continue to make the payments due under the provisions of this contract.
- 4.2 As the VENDOR remains the owner of the equipment until full payment of the price, the PURCHASER hereby expressly agrees not to sell nor in any way whatsoever dispose of the equipment without the prior written consent of the VENDOR.
- 4.3 The PURCHASER agrees to use and to maintain with care the equipment which is the subject hereof, to keep it at all times in good working order and to effect at its expense such repairs as are necessary or useful for its maintenance, and to assume all expenses related to the use and operation of the equipment. Worn out or defective parts shall be replaced forthwith. The VENDOR shall at all times have reasonable access to the equipment for the purpose of examining it. In the event that defects have not been repaired, the VENDOR may cause to be effected any repair or maintenance it considers necessary and the expenses so incurred shall be added to the next monthly payment due under the provisions hereof. The compensation clause referred to in paragraph 3.0 is applicable in such cases.
- 4.4 It is the PURCHASER's responsibility and obligation to act in such a way and to see to it that the equipment is used, operated and driven only by duly qualified and experienced operators. The equipment shall be used in accordance with its specifications and for the purposes for which it was designed and for which it is intended. The PURCHASER shall not authorize it to be used by any person other than himself or his employees.
- 4.5 The PURCHASER hereby expressly agrees to observe and to ensure that his employees comply with the laws, regulations, orders, decrees and other manifestations of the public will applicable to the use, ownership, possession, maintenance or inspection of the equipment.

5.0 LIENS

- 5.1 The PURCHASER shall keep the equipment free of any charges, encumbrances, liens, etc.

In the event that the equipment becomes so encumbered, the VENDOR may, at his discretion, pay the amount required to remove or cancel any such bond, lien, charge or security, obtain the release of it and add the amounts so paid to the sums otherwise due under the provisions hereof to the next monthly payment. Such amounts shall then be immediately due and payable and shall bear interest as provided herein.

- 5.2 All fees and expenses for licences, registrations, dues, costs, taxes or charges that may be imposed, established or

deducted, directly or indirectly, on or with respect to the equipment or its use, shall be the exclusive responsibility of the purchaser and shall be paid forthwith, when they are due. If the PURCHASER fails to pay such sums, the VENDOR may, at his discretion, pay such sums and add them to the sums due under the provisions hereof. Such sum shall then become payable with the next monthly instalment and shall bear interest at the same rate as the principal due under the terms of this sale.

6.0 INSURANCE

- 6.1 The parties agree that the PURCHASER's commercial vehicles shall be insured through the VENDOR. The insurance policy shall cover loss caused by fire, theft and collision of the commercial vehicle and third party liability arising out of the use of the vehicles during the performance of the VENDOR's business. This insurance shall be cancelled as soon as the PURCHASER ceases to work for the VENDOR. Any credit or refund of premiums by the insurance company shall go to the VENDOR. A copy of the insurance policy is attached (Schedule «D»).

It is understood that the VENDOR shall pay the insurance premiums upon issuance of the policy. The PURCHASER shall assume part of the costs in accordance with the method set forth in the owner-operator contract. It is also understood that the PURCHASER shall bear all the costs required by the insurance company for an insured market value of the vehicle over \$84,000.00.

The basic insurance policy includes the following coverage in the event of loss:

SEE SCHEDULE «D»

It is understood that the deductible of \$10,000. per event is the full responsibility of the PURCHASER where there is damage only to the tractor, which amount may be deducted by the VENDOR from all amounts due to the PURCHASER. However, where an accident involves damage to the tractor, trailer and/or cargo, the deductible of \$10,000. per event shall be apportioned pro rata to the loss.

All transport claims shall be the responsibility of the VENDOR unless the loss claimed took place and was caused through the negligence or wilful misconduct of the PURCHASER. The VENDOR shall act as the PURCHASER's representative in settling any supplementary insurance claim made by the PURCHASER.

The PURCHASER shall co-operate fully in settling, defending and pursuing any insurance claim. The proceeds of any insurance claim received by the VENDOR shall be held in trust by the VENDOR for the PURCHASER and shall be subject to:

- a) any right of compensation of the VENDOR,
- b) any preference interest of which the VENDOR is aware, and
- c) any expenses incurred by the VENDOR in respect of the recovery of such insurance claim proceeds.

The PURCHASER shall immediately advise the VENDOR and the insurers of any accident or event for which he is responsible,

involving property damage or personal injury during the performance of this contract. If the PURCHASER does not so advise the VENDOR and the insurers, the VENDOR shall hold him the only one responsible for any damage that the VENDOR may have to pay and the PURCHASER agrees to indemnify the VENDOR in respect thereof.

7.0 DEFAULT

7.1 THE PURCHASER shall be in default of the terms hereof:

- a) If he fails to pay by the due date any sum due under the terms hereof.
- b) If he fails to observe each and every one of his obligations under the terms hereof after ten (10) days' written notice sent by certified mail or by notification.
- c) If the equipment which is the subject hereof is sold by court order or if the equipment, in whole or in part, is seized or confiscated by virtue of any legal proceeding or if it becomes subject to a preference, charge or security interest of any kind, or if it is damaged or destroyed, or if it is impounded or a writ of seizure is issued against the equipment and such default is not remedied within ten (10) days of the posting by certified mail of a notice to that effect given to the PURCHASER by the VENDOR.
- d) If the PURCHASER generally ceases to honour his obligations on a timely basis or he is put into bankruptcy or is the subject of a petition in bankruptcy or if he makes an assignment of his assets or if he makes a proposal for the benefit of his creditors.

If the PURCHASER is in default of the terms hereof, the VENDOR may, if he wishes, terminate this contract and, further, the VENDOR may, in addition to and without prejudicing all other remedies, exercise any of the following remedies:

- a) Immediately claim any unpaid balance of principal and interest of the selling price of the equipment and interest on that amount at the rate mentioned herein.
- b) In addition to claiming the balance of the selling price, take immediate possession of the equipment, the PURCHASER hereby expressly authorizing the VENDOR to enter the premises in which the equipment is located in order to take possession of it then and there and remove same from said premises in order to put it in a safe place.
- c) If the VENDOR repossesses the equipment, he may place it in storage, repair it and put it in good working order and repair it in order then to resell it by public sale and by mutual agreement without notice or legal proceedings, the terms and conditions of such sale hereby being expressly left to the entire discretion of the VENDOR without any obligation towards the PURCHASER, other than to

remit to it the excess proceeds of the sale, if any, once all sums due to the VENDOR by the PURCHASER are duly paid out of the proceeds of the sale. It is here and now agreed and understood that the legal fees and other costs involved in the repossession and sale by court order or sale by mutual consent shall be borne entirely by the PURCHASER as an integral part of the sums it owes to the VENDOR.

- d) The PURCHASER hereby expressly agrees, if the VENDOR repossesses the equipment, to hand over the certificate of registration duly endorsed and all other documents required, useful or necessary to give full effect to the rights of the VENDOR under the terms of the preceding sub-paragraph.

8.0 SALE AND ASSIGNMENT

- 8.1 The PURCHASER may neither sell nor lease the equipment that is the subject hereof, nor may it relinquish possession of said equipment or transfer interests in the equipment under the terms of this contract without the prior written consent of the VENDOR.
- 8.2 The PURCHASER may not sell or assign this contract in any way nor encumber it with a charge of any kind without the prior written consent of the VENDOR.

9.0 INTERPRETATION

- 9.1 If any of the provisions of this contract are declared void under the terms of an applicable law by a tribunal of competent authority, the remaining provisions of this contract shall remain unchanged and shall continue to be of full force and effect.
- 9.2 This contract shall be governed by and shall be read in accordance with the provisions of the laws of the province of Quebec.
- 9.3 The fact that the VENDOR does not exercise a right or remedy available to him under the terms of this contract shall in no way affect his rights to exercise such remedy in the future and shall not in any case be considered a waiver of or acquiescence to such default on the part of the PURCHASER.
- 9.4 In the event of default by the PURCHASER, it is clearly agreed and understood that all sums of money previously paid by the PURCHASER to the VENDOR shall be forfeited to the VENDOR without indemnity or obligation to return any to the purchaser.
- 9.5 This agreement constitutes the entire understanding reached by the parties, cancels and supersedes any previous oral or written provision. The parties moreover expressly agree that there exist no other conditions, warranties, representations, express or implied, other than those contained herein.
- 9.6 This agreement is for the benefit of and binding upon the parties hereto together with their respective successors and assigns.
- 9.7 Where two or more persons or corporations are bound under the terms of this agreement, they shall be so bound jointly with

fill up where he chooses to do so. For example, in the United States, drivers who know Indian reserves where fuel is sold at a discount cannot fill up there: Damaco would not receive any rebate in such a case from the State in question.

5. The witnesses all confirmed that since they incorporated, there had been no change in their working conditions: same routes, same Damaco customers to serve, same rules.

Thus, all dispatching is still within the exclusive control of Damaco dispatchers.

Thus, there is only one seniority list for all types of drivers and they have all retained and continue to retain their seniority rank.

The automobile insurance has not changed and is imposed on everyone. The group insurances are the same for all types of drivers.

6. It is Damaco itself that deals with the Transport Commission.

7. Several of the incorporations were done using Damaco agents.

8. The accounting for several incorporated owner-operators is done by Damaco accountants.

9. No driver has the right to make his own deal for a

return trip after a delivery. He must contact a Damaco dispatcher for goods to be transported on the return leg.

10. It was at Damaco's instigation that almost all incorporated drivers purchased a tractor from Damaco and became incorporated. Very often, the tractor purchased was the same one that had been assigned to him previously as a salaried driver.

11. Departures are on Sunday for all types of drivers. They all must report every day at the same times.

12. All types of drivers operate with Damaco transport licences.

13. Not one of the witnesses could explain how the accounting for fuel rebates works. Several blindly accept what the Damaco accountants do about them.

14. For any delivery in either direction, no driver is free to take the route of his choice. He must follow the routes set by Damaco dispatchers.

15. No driver of any type whatsoever has the right to argue about a trip.

16. There is no weigh-in at Damaco. No driver knows the weight of a trip assigned to him by the dispatcher except to the extent that it appears on the bill of lading. If he believes the load is too heavy, his only recourse is to advise Damaco which decides whether or not the risk must be taken. Once again, the Damaco dispatcher decides and the

driver cannot dispute that decision.

17. No incorporated driver is permitted to make local deliveries.

18. All incorporated drivers and the alleged independent contractor signed the owner-operator contract reproduced above.

V

In a recent case, Croustilles Yum Yum Inc. c. Tribunal du travail, [1989] R.J.Q. 2425 (S.C.), Mr. Justice G. Gauthier of the Superior Court of Quebec stated that, beyond the legal nature of the contracts used, the criteria for establishing the relationship of subordination necessary for concluding that a person is an employee, are mostly economic: 1) ownership of the tools, 2) control, 3) the chance for profit, and 4) the risk of loss.

In that case, the company claimed that certain persons were distributors on contract, that is, independent contractors, and not employees and that, as a result, they could not be unionized and, consequently, certified.

The Honourable Judge, following consideration of the file, took into account the following factors: 1) the distributors were subject to the control and supervision of the company through a supervisor; 2) there was control through performance evaluation; 3) the distributors did not own the customer lists; 4) the distributors could not alienate their rights under the contract without the

company's express authorization.

And he concluded that there was a relationship of control and subordination such that the distributors could not claim to have independent contractor status.

In that case, there were among those distributors persons who were incorporated. Having noted that the incorporated distributors had signed as personal a commitment as the other distributors, the learned judge concluded that there was no reason to consider them differently.

We refer to this case falling under the jurisdiction of Quebec for two reasons. The first one. The wording of the Quebec Labour Code does not contain specific provisions dealing with dependent contractors as is the case in the Canada Labour Code (see text of the Federal Code, at pages 9 & 10 above). The second one. The learned Judge relied in part on common law criteria to arrive at his decision. These criteria were in fact established primarily by the Privy Council in Montreal v. Montreal Locomotive Works Ltd. et al., [1947] 1 D.L.R. 161. That case established, to use a well-known expression in common law, a «four-fold test»: control, ownership of the tools, chance of profit and risk of loss.

This Board has already established that the provisions of the Code that it must interpret and apply confer upon it obligations and powers that exceed this common law test.

It is interesting to note that, in the case at bar, even confining ourselves to the application of the «four-fold

test», the alleged independent contractor and the incorporated drivers do not qualify as independent contractors.

Indeed, under the heading ownership of tools, the following must be noted. First, with respect to all truck drivers, incorporated or not, who signed a contract to purchase a tractor from Damaco, according to the provisions of the form contract reproduced above, and precisely because of some of those provisions, we must seriously ask ourselves about how tenuous their right of ownership is.

But there is much more.

The right of ownership implies the exclusive and unlimited right over a property, the right to possess it, to use it, to enjoy it and to dispose of it in one's absolute discretion. There is no point in restating in this regard all restrictions on the right of ownership of the alleged independent drivers, incorporated or not, bound to Damaco through their work tool, their tractor, which restrictions emerge from the evidence in this case.

Here are some examples. The possession of the tractors sold to these drivers, according to the terms of the purchase contract, of which a sample has been reproduced in full above, is at the very least uncertain.

The right to use it is limited in many ways. They can only use it to make trips for Damaco. The tractors are limited to Damaco's exclusive use and in the name of that company without exception. They cannot develop any personal

customer base. They cannot affix signs indicating the identity of their own legal entity if incorporated or their personal identity if not incorporated. Only Damaco's colours and emblems are to be displayed on the tractors.

How can it be contended that they enjoy their tractors when they are bound by a clause under which they cannot refuse any type of load, any kind of trip?

They cannot have any other driver of their choice drive them. That choice is subject to the express consent of Damaco.

They cannot choose their own route to deliver a cargo. They cannot buy fuel where they please.

They cannot insure their property with the insurer of their choice.

All dealings with the Transport Commission are handled by Damaco. All licences are the property of Damaco.

In several cases, the accounting for the incorporated truckers is done by Damaco. Several incorporations were done by Damaco agents: notaries and accountants.

Under the heading of control, their dependence is obvious as we have seen in the analysis of the evidence.

Here are some examples amongst others.

The same rules that Damaco imposes on its salaried drivers

apply to the incorporated drivers and/or the alleged independent driver. Damaco dispatchers have as heavy a hand over all activities of these drivers as they do over those of the salaried drivers.

They must fill out, just like the salaried drivers, logbooks and damage reports. The evidence showed that these drivers have noticed no change in their working conditions since moving up to tractor ownership compared to their working conditions as salaried drivers. Same thing before as after: absolute control over all their operations by Damaco. It is the Damaco dispatchers who dispatch the trips, who direct the employees of these owners and these tractor owners themselves, and who discipline both.

Even under the headings of chance of profit and risk of loss, it would be possible to challenge the existence of either in the kind of financial arrangement that we find between these tractor drivers and Damaco. Indeed, there is no individual negotiation between them and Damaco for a trip price. They are paid by the mile just like the salaried truckers. The chance to make a profit does not depend on their ability to negotiate a price or even on the additional effort in time that they are prepared to put in to make such a profit, since they are all paid at the same price per mile and they have no control over the number of trips that they can make. With respect to losses, they are all under Damaco's complete control. The latter has free rein over the number of trips that it decides to dispatch to each of these drivers. It merely has to turn off this tap and these drivers are on the street.

Therefore, according to the common law criteria or the «four-fold test», all drivers in question are dependent contractors.

A fortiori, the provisions of the Canada Labour Code and Board decisions respecting dependent contractors lead to the conclusion that the alleged independent contractor and all incorporated drivers in the case at bar are dependent contractors. Accordingly, they are employees within the meaning of the Code and they may form part of the bargaining unit sought by the union in its application for certification.

The Canada Labour Code places emphasis on economic dependence.

«c) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that he is, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.»

There is no doubt that these drivers are most completely economically dependent on Damaco and are under the strictest obligation to perform duties for that company.

It was particularly in Midland Superior Express Ltd. (1974), 4 di p. 32; [1974] 1 Can LRBR 267; and 74 CLLC 16,104 (CLRb no. 10); and K.J.R. Associates Ltd. (1979), 36 di p. 36; and [1979] 2 Can LRBR 445 (CLRb no. 193), that the Board explained its interpretation of the provisions of the Code dealing with dependent contractors in the trucking industry within its jurisdiction. Those cases are very well suited to the situation of the drivers who are at issue in this case.

Do the incorporated or alleged independent truckers who from time to time employ drivers thereby escape the ambit of the Code? In K.J.R. Associates Ltd., supra, the Board was dealing with the same situation and held:

«The economic dependence of K.J.R. on Reimer is total and absolute. There are no entrepreneurial options or flexibility afforded K.J.R. In fact, the only discretion available appears to be in the initial acceptance of the agreements, either take it or leave it. K.J.R. is a dependent contractor.

Having so found we examine the character of K.J.R. as an employer. We find that K.J.R. lacks the traditional indicia normally exercised by an employer, i.e., effectively hiring, firing, control and assignment of functions and hours of work, etc. In fact, K.J.R.'s function is comparable to that of a supervisor. Its employees are more properly the employees of Reimer.

Pursuant to our authority under section 118p) (i) of the Code, we find that K.J.R. is not an employer within the meaning of the Code.»

(pages 44; and 451)

In the instant case, the Board reaches the same conclusion with respect to each and every trucker involved. It will, however, make an exception insofar as Gilles Rousseau Sports Inc. is concerned. That company purchased a tractor from Damaco and signed an owner-operator contract with Damaco. However, during the golfing season, the tractor is used, with Damaco's permission, for transport purposes related to the operations of the Rousseau sports business. In the off-season, on the other hand, the tractor, driven by the son of the owner of Rousseau Sports, carries out transport exclusively for Damaco, and under the same conditions as all the other incorporated truckers.

This Board decision will only affect that part of the Rousseau Sports business that involves making the tractor available to Damaco and only for that period of the year

during which Rousseau's truck is driven by his son under the orders and supervision of Damaco dispatchers.

The argument raised by Damaco to the effect that the very fact of incorporation of the truck drivers would mean their exclusion from any bargaining unit was not seriously pursued by the employer. However, the Board wishes to add the following comments in this regard.

It is true that, in corporate law, it is recognized that corporations have a legal personality distinct from the persons who incorporated them and that the latter can only be directly sought out in very exceptional circumstances. When this is done, it is called «lifting the corporate veil». The common law courts only allow this veil to be lifted in cases of fraud or where it is clearly established that the incorporation is used in order to attempt to circumvent the provisions of a law.

But in labour law, the objectives are not the same. In any case, not the labour law that this administrative tribunal, the Canada Labour Relations Board, must apply, that is, the Canada Labour Code.

The Board is obliged to ensure that the right to unionize is available to any person who is an employee within the meaning of the Code. Because the concepts regarding dependent contractors are specifically set forth in the Code, the Board believes that it has and is intended to have the legal authority to lift the corporate veil in order to uncover the particulars that will allow it to determine the degree of economic dependence facing these

incorporated contractors. It is in this regard that the grounds for lifting the corporate veil go beyond those found in other legislation, namely fraud or an attempt to circumvent the provisions of a law.

The Board could stop there. Of course, in a case where the Board is faced with examining this issue, as in this case, the Board may sometimes uncover situations that come close to being attempts to circumvent the provisions of the law it must apply, through incorporation or otherwise, and that might bear some similarity to fraud; a company that turns out not to be really managed by itself, a company that has been imposed upon someone in order to block an application for certification, a company that is not really a company when faced, for example, with the requirements of the OHSC. While all this is not the main purpose of this Board, its discoveries in this direction can only add additional elements to the assessment that it makes of the economically dependent nature of the incorporated contractors which, within the meaning of the Code, makes employees of them.

During the Board's investigation, further to the application for certification, it turned out that, on the date the application was filed, the applicant union had signed up a certain number of the truck drivers involved. They had expressed their desire to be represented by the applicant union.

Finally, when the application was filed, the applicant union had the support of the majority of all employees sought to be covered, including the truckers incorporated

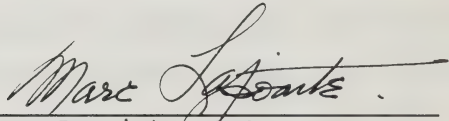
at the time and (or) independent drivers.

Accordingly, the Board will issue a certification order amending the one issued on August 16, 1989.

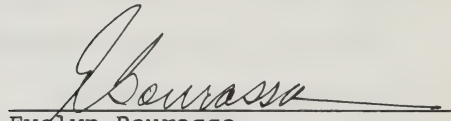
It will be worded as follows:

«all drivers including dependent contractor drivers and/or drivers who are owner-operators of tractors of Transport Damaco International Ltée, excluding office employees, mechanics, dispatchers and those above the rank of dispatcher.»

This is a unanimous decision.



Marc Lapointe, Q.C.
Chairman pursuant to
section 11 of the Code



Evelyn Bourassa
Member of the Board



Robert Cadieux
Member of the Board

ISSUED at Ottawa, this 15th day of February 1991.

information

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Summary

CATHY MILLER, COMPLAINANT, CANADIAN
UNION OF POSTAL WORKERS, RESPONDENT
UNION, AND CANADA POST CORPORATION,
EMPLOYER.

Board File: 745-3630

Decision No.: 854

A postal clerk was dismissed by Canada Post Corporation for allegedly abandoning her position. Canada Post and the Canadian Union of Postal Workers discovered the day before the dismissal was to have been arbitrated that no actual grievance document had been filed by the union, although a grievance number had been assigned to the issue, it had been the subject of discussions between the parties and for some months both thought that an actual grievance existed. The arbitrator decided he had no jurisdiction to deal with the matter because there was no actual grievance before him. C.U.P.W. was unable at that point to file the necessary grievance paper because the time limit prescribed by the collective agreement for doing so had long since been passed.

The postal clerk complained to the Board that the union's mistake constituted a failure of its duty of fair representation and was contrary to section 37 of the Canada Labour Code (Part I - Industrial Relations). C.U.P.W. virtually pleaded guilty to the charge.

Notwithstanding the latter, the Board analyzed the facts of the case and concluded that C.U.P.W. had not been seriously or grossly negligent and that its failure was not arbitrary, discriminatory or in bad faith, contrary to section 37 of the Code.

Résumé de Décision

CATHY MILLER, PLAIGNANTE, LE
SYNDICAT DES POSTIERS DU CANADA,
SYNDICAT INTIMÉ, ET LA SOCIÉTÉ
CANADIENNE DES POSTES, EMPLOYEUR.

Dossier du Conseil: 745-3630

No de Décision: 854

La Société canadienne des postes a congédié une employée, commis des postes, qui aurait quitté son poste. L'employeur et le Syndicat des postiers du Canada ont découvert la veille du jour où la question du congédiement devait être réglée à l'arbitrage que le syndicat n'avait pas déposé de grief comme tel, même si un numéro de grief avait été attribué. Le grief avait fait l'objet de discussions entre les parties et, pendant plusieurs mois, les deux croyaient qu'il existait un grief. L'arbitre a conclu qu'il n'avait pas la compétence voulue pour trancher la question parce qu'il n'avait pas reçu de grief. Le syndicat ne pouvait à ce moment-là déposer un grief parce que le délai de présentation prévu par la convention collective était expiré depuis longtemps.

L'employée a déposé une plainte auprès du Conseil alléguant que l'erreur du syndicat constituait un manquement à son devoir de représentation juste, en violation de l'article 37 du Code canadien du travail (Partie I - Relations du travail). Le syndicat a pratiquement avoué sa culpabilité.

Le Conseil a tout de même analysé les faits de l'affaire et a conclu que le syndicat n'avait pas fait preuve de négligence grave ou flagrante et qu'il n'avait pas agi de façon arbitraire, discriminatoire ou de mauvaise foi, en violation de l'article 37 du Code.



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Reasons for decision

Cathy Miller,
complainant,
Canadian Union of
Postal Workers,
respondent union, and
Canada Post Corporation,
employer.

Board File: 745-3630

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Calvin B. Davis and Evelyn Bourassa.

Appearances:

Hamish Dunlop, for the complainant, Cathy Miller;
James Hayes, for the respondent union, Canadian Union of
Postal Workers; and
Ian Szlazak, for the employer, Canada Post Corporation.

These reasons for decision were written by Vice-Chairman Eberlee.

I

In this case, former postal clerk Cathy Miller has alleged that the Canadian Union of Postal Workers (C.U.P.W.) failed in its duty of fair representation toward her, and violated section 37 of the Canada Labour Code (Part I - Industrial Relations), when it neglected to file a grievance on her behalf to contest her dismissal by Canada Post Corporation on or about April 2, 1989.

What is unusual about the situation is that C.U.P.W. virtually pleaded guilty as charged and offered to "participate in a remedy if one needs to be granted", to quote the union's counsel.

The Board held a hearing into the matter in Toronto on December 7, 1990.

II

The facts, such as they are, can be summarized very readily: Ms. Cathy Miller had worked as a postal clerk in the Toronto area since 1985; the record indicates that she began encountering some severe personal problems. Canada Post concluded that she was absent from work excessively. The employer accordingly notified her by letter dated March 28, 1988 that she would be released from employment for "incapacity". The proposed release then became the subject of a grievance; under the terms of the collective agreement between C.U.P.W. and Canada Post, the actual release was delayed, pending determination of the grievance by an arbitrator.

Almost a year passed, with the grievance against the proposed release awaiting adjudication, and Canada Post decided that Ms. Miller had actually abandoned her position. It sent her a letter advising her that her employment was terminated effective early in April, 1989, for alleged abandonment.

The usual practice in a case of termination is for a copy of the termination letter to be sent by Canada Post to the union, with the original copy to the employee being dismissed. Invariably, a grievance is then prepared and

filed by the union. One copy is provided by the union to the employee. What happened in Ms. Miller's case is somewhat unclear. She received her termination letter; the union received a copy. A grievance number was assigned to the matter but the union failed to file an actual grievance document.

Ms. Miller was relatively passive in dealing herself with the situation. She asserts - and this was not contradicted at the hearing - that she called the C.U.P.W. local office in April, 1989, spoke to a male person whose name she did not obtain and was assured that a grievance had been filed against her termination. She put nothing on paper, either for the union or the employer. The fact that no copy of an actual grievance was sent to her did not cause her to be suspicious that something was out of order. Nor did she make any other telephone calls or enquiries on her own behalf at that time.

The Board was told that both C.U.P.W. and Canada Post also assumed there were two Miller grievances under active consideration after April, 1989. Canada Post counsel even wrote in a proposed agreed statement of facts that two grievances existed.

An arbitration hearing into the first grievance - concerning the proposed release for incapacity - began on June 29, 1989. During the course of the hearing, counsel for the parties discussed in front of the arbitrator the possibility of amalgamating the two grievances. According to the arbitrator's decision, this discussion proved inconclusive; the arbitration was adjourned at the request of the parties, so that this and other matters could be considered.

There then followed discussions between the parties concerning the two grievances, including consideration of a possible settlement. Finally, however, the arbitration was scheduled to resume on January 25, 1990. On January 24, a C.U.P.W. officer was informed by someone representing Canada Post that there was no record of an actual grievance ever having been filed with the employer. After checking out this claim, C.U.P.W. had to concede that a second grievance did not exist. The union decided, however, to try to fight Ms. Miller's case notwithstanding the absence of a grievance and actively represented her by advancing various arguments, which do not need to be gone into here but are reported in the arbitrator's decision. The arbitrator decided, however, that he had no jurisdiction to deal with the abandonment matter because no grievance existed. Thus, her dismissal remained in effect. At that point, neither she nor C.U.P.W. could correct the problem by presenting a grievance since the deadline for filing one had long since passed.

Section 37 of the Code, which is alleged to have been violated by C.U.P.W., reads as follows:

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

In her complaint to the Board, Ms. Miller asserted that C.U.P.W. had "acted in an arbitrary manner in not filing a grievance" and had "discriminated against her in not following its normal practice and grieving Canada Post's action". Ms. Miller asked the Board to order the union to process a grievance through to arbitration on the abandonment issue and to compensate her for loss of wages

and benefits and for legal costs.

C.U.P.W.'s counsel told the Board that the union feels Ms. Miller did not receive the standard of representation to which she was entitled, although there was no discrimination or bad faith in C.U.P.W.'s conduct. He conceded that the situation "looks a little arbitrary to us". C.U.P.W.'s position was that the Board should use its remedial powers to have the abandonment issue arbitrated forthwith.

C.U.P.W.'s strongest defence came not from C.U.P.W., but from the most improbable of sources - Canada Post. This was not out of the kindness of its heart, but rather out of a wish to avoid being hit by some remedy which the Board might devise. Canada Post argued that the complaint was untimely, in that the complainant must have known there was no grievance more than 90 days before she filed it on April 19, 1990, and that it was without any merit. The union had simply made an error, an inadvertence; there was no negligence involved. Mistakes were bound to happen when the union was dealing with many thousands of grievances annually and so on. On the question of a remedy, counsel for Canada Post suggested that if the Board did find C.U.P.W. had violated section 37, no cost penalty of any kind should fall upon the corporation. Moreover, C.P.C. should have its costs from C.U.P.W. on a solicitor and client basis.

At this point in these reasons, we shall comment only upon the claim that the complaint is untimely: we disagree. Ms. Miller did not know there was no grievance until January 24, 1990. She filed her complaint, as has been indicated, on April 19, 1990. That is within the 90 days

specified in section 97(2) of the Code for a complaint to be entertainable by the Board.

III

Section 37 is unique among the various unfair practice provisions of the Code in that it usually involves quite directly the interests of three, rather than the usual two, parties in labour-management relations. It is designed to ensure that unions, in their administration of collective agreements, do not behave improperly toward the people they are supposed to represent. But most of the actual "administration" of collective agreements is done by employers in the sense that they, in directing the activities of their employees on the job, do the overseeing, the assigning, the paying, the disciplining and so on. The union's basic role, once the collective agreement has been put in place, is in most instances a reactive one, to ensure that the agreement is being observed.

The standard complaint under section 37 is similar to this one and involves an employee complaining that a union has failed to progress a grievance on his or her behalf against some action or inaction by the employer in respect of the application of the collective agreement. Notwithstanding that the only really relevant claims of wrong-doing at a section 37 hearing on handling of the grievance are those directed at the respondent union (unless the union and the employer have colluded), and that the employer is not on trial, the Board invariably adds the employer as an interested party in order that it may make submissions relative to its interest.

Generally speaking, the sole employer interest acknowledged and recognized by the Board has to do with the question of the direct cost of any remedy. When the Board finds that the union has acted improperly in dropping a dismissal grievance, for example, and orders the union to do with that grievance what it should have done in the first place, the Board believes that the employer is naturally concerned that its own costs arising out of the remedy should be no greater than they would have been if things had not taken a course contrary to section 37. Thus the Board has usually required the union to assume the cost of compensating the wronged employee for lost wages between the time of the dismissal and the time the Board orders that it go to arbitration-payable usually only if the arbitrator upholds the grievance and decides that compensation is to be awarded.

Obviously, however, the employer's real interest is frequently something other than simply the avoidance of certain costs associated with a possible remedy. It is not unreasonable to speculate that the employer's main hope when the union faces a section 37 complaint in a dismissal case is that the result will not be a re-opening of the dismissal and its possible reversal at arbitration. It is not difficult to understand that an employer feels entitled to the benefit of any technicalities, in terms of collective agreement time limits and the like, that may protect its action against the employee. Time limits are valid features of collective agreements, applying to employers, as well as to unions, and designed to help ensure finality in respect of the resolution of disputes and to buttress the stability of industrial relations, for the mutual benefit of all parties. The "sanctity" of time limits is a feature of industrial relations not to be taken

lightly by anybody, least of all this Board.

A fundamental problem for a union respondent faced with an accusation that it has violated section 37 in not pressing a dismissal grievance to arbitration is that it is virtually powerless to offer an effective settlement to a complainant, even where it recognizes its liability, or simply feels a moral obligation, and wishes to resolve the problem. It cannot act, once the time limits for carrying a grievance to arbitration have been exceeded, without the co-operation of the employer.

Nothing like this hampers an employer respondent in respect of an acknowledged violation of an unfair practice provision of the Code applying to it.

For example, if an employer dismisses somebody during a union organizing campaign and a union alleges that the employer has violated section 94(3)(a)(i) of the Code, the employer is quite free to make a settlement with the union which, while not necessarily acknowledging that a fault has been committed, nevertheless puts things back where they were before, so as to enable the union to withdraw the complaint.

In the case of a complaint that a union has violated section 37 when it has neglected or declined to take a grievance to arbitration, and where time limits for initiating arbitration have expired, the union can obtain arbitration and thereby settle the complaint only if an employer agrees to waive time limits and permit the implementation of that procedure.

For the Board, there is frequently little point in trying to mediate a section 37 complaint because no settlement is possible without employer co-operation. And it is not surprising that, in our adversarial, too often dog-eat-dog world of industrial relations, an employer, having dismissed somebody and having thought that it had won the battle on the real technicality of time limits in the collective agreement, will not be willing to place that victory in jeopardy by allowing the main issue of the propriety of the dismissal to be adjudicated by an independent third party. That is clearly the situation here, where Canada Post's position obviously is that C.U.P.W., having made a mistake, is going to have to endure having its nose rubbed in it. Of course, that is the kind of tit for tat to be expected in the C.P.C./C.U.P.W. world, bearing in mind the number of times C.U.P.W. has failed to resist the temptation to rub Canada Post's nose in its mistakes.

As we have suggested, arbitration of the issue is the standard remedy prescribed for a violation of section 37 when it involves, as it almost always does, a union failure to deal properly with some alleged violation of the collective agreement. The Board takes this course because it does not believe it has the mandate to judge the merits of an alleged violation of the collective agreement; its role in connection with a section 37 complaint is only to look at and judge the conduct of the union in dealing with that alleged violation. Obviously it has to know what the alleged violation was all about in order to determine whether the union handled it in such a manner as not to have violated section 37. But it is the handling of the issue and not the issue itself that is the focus of a section 37 inquiry. The Board has on several occasions,

with respect to dismissals, found that the union has violated section 37 in its handling of the matter, has ordered the dismissal grievance to be arbitrated, whereupon the arbitrator has upheld the dismissal. Despite this apparent incongruity, the Board has been well within its proper mandate in such circumstances in giving the arbitrator the jurisdiction to do his or her job of judging the merits of the dismissal itself.

On the other hand, while the Board has almost always confined itself to prescribing a procedural, rather than a substantive, remedy for violations of section 37, the language of section 99 of the Code is broad enough, in our opinion, to permit the ordering of something more substantive than has been the norm where such might be deemed appropriate. Section 99(1)(b) reads as follows:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may ...

(b) in respect of a contravention of section 37, require a trade union to take and carry on on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on;"

However, section 99(2) reads as follows:

"99.(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

We take this to offer the Board in the case of a dismissal, for example, the option of deciding that a union's violation of section 37 shall not be directed to arbitration, with any consequent impact on the employer, but shall fall wholly upon the union in terms of some substantial payment of money to compensate for the loss suffered by a person by the fact that his or her grievance was mishandled contrary to the Code and the person has no job. Of course, such a remedy would be unconventional in relation to what has been the practice of the Board, but it is nevertheless possible to speculate that it might well be a valid approach in the appropriate set of circumstances.

This train of speculation also gives rise to the thought that a union which was accused of violating section 37 and was desirous of actually settling the matter to the mutual satisfaction of itself and the complainant could well look at the possibility of offering appropriate financial compensation. This would obviate the need of a union to seek the goodwill of the respondent employer and/or the judgment of the Board and the adjudication of an arbitrator to get the matter resolved. Of course, it might be utterly impractical in most cases because union treasuries are not over-endowed with funds.

IV

In this case, if C.U.P.W. really felt it had a moral obligation in respect of its representation of Ms. Miller, it could have engaged with her in a genuine settlement effort looking to a withdrawal of the complaint, which would have kept the employer's interests out of the picture

and transferred no responsibility to the Board. However, whether or not it discomfits us, responsibility has been thrust upon us here. It would be improper if we exercised that responsibility by simply accepting a guilty plea and prescribing a remedy that will inevitably impact upon the employer. We have the duty to look just as carefully at this situation as we would at any other section 37 complaint before us for determination. We have a responsibility to decide whether the union really did violate section 37, in terms of the Board's own criteria, not on the basis of an admission made by C.U.P.W. for whatever reason and without any apparent effort to settle with the complainant.

The evidence, such as it is, suggests that a simple mistake was made, in that the normal practice of filing a grievance document was not followed in this instance. The passivity of the complainant did not help matters. The union intended to file a grievance document because it assigned a number to the grievance. For a considerable period of time - until it was too late under the collective agreement to rectify the mistake - everybody thought there was a grievance. It was only at the last minute that the records showed a piece of paper had never in fact been filed.

The point does not need to be belaboured and the facts do not need to be turned inside out for purposes of analysis: there is simply no evidence of any kind to raise the slightest suspicion that the union's failure to file a grievance document was discriminatory or bad faith conduct.

However, what happened was not supposed to have happened. The union clearly made a mistake. Although nobody really

knows how or why it came about that no actual piece of paper setting out a grievance against the dismissal was filed on Ms. Miller's behalf, we are safe in describing the situation as one involving carelessness or negligence. While it was a small slip-up in itself, it had extremely serious consequences for Ms. Miller. In effect, she ended up with no means of challenging her dismissal.

What the Board must decide is whether the union's neglect was such as to warrant being judged arbitrary and thus in violation of section 37.

In viewing failures by unions in their representation of employees, the C.L.R.B., other labour relations boards and the courts have distinguished between negligence that is merely "simple" and negligence that is "serious". In the Brenda Haley case (see Brenda Haley (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB no. 271); and Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304), the full Board in plenary session made a policy decision that "simple negligence" was not a breach of the duty of fair representation but that seriously negligent conduct would equate to arbitrariness and be in violation of section 37. Similarly the Supreme Court of Canada in Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509, at page 567 said in effect that union representation must be "without serious or major negligence" and in Centre hospitalier Régina Ltée v. Labour Code, [1990], 1 S.C.R. 1330, pages 1348-1349 repeated that a union must represent the employee without "serious negligence".

In the Brenda Haley case, a grievance was advanced against a dismissal but at a certain stage a time limit was missed.

The actual mistake and its consequences for the employee were very similar and certainly no less serious than in the instant case. The Board decided on the basis of the particular facts that the conduct was "simple negligence" and not a violation of the Code.

A recent decision of the Board, Don Greenwood et al. (1990), 90 CLLC 16,034 (CLRB no. 795), dealt with the failure of C.U.P.W. to file a grievance within the time limit specified in the collective agreement. The grievance had to do with a matter of considerably less gravity than is the case here, but the facts surrounding the union's failure were far less straightforward than the situation in this matter. The Board characterized that failure as "simple negligence" and not, as such, a violation of the section of the Code.

Our problem is to decide whether C.U.P.W.'s failure was "simple" or "serious" negligence. The facts in Brenda Haley, supra, and Don Greenwood et al., supra, convinced the Board in each instance that the negligence was simple. The Quebec Labour Court has defined serious or gross negligence in Association Montréalaise d'Action Récréative et Culturelle, no. 500-28-000608-786, August 8, 1979 (T.T.) as "an attitude marked either by gross error, by serious mistake committed by its representatives, by an unforgivable omission of requisite precautions, by an acknowledged or obvious lack of fitness, or by a manifest lack of concern ..."

It appears that the Ontario Board's test to determine if there has been gross negligence in a particular case is whether the attitude of the union has been non-caring or perfunctory. In Jeffrey Sack and C. Michael Mitchell,

Ontario Labour Relations Board Law and Practice, (Toronto: Butterworth's, 1985), there is the following summary:

"Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to obtain the data to justify a decision; it has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent and summary, or capricious and non-caring of perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. As the Board said in ITE Industries:

'It is clear that in order to establish a breach of section [68], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.'

The Board has said, however, that there comes a point when mere negligence becomes gross negligence which may be viewed as arbitrary when it reflects a complete disregard for critical consequences."

(page 477)

The only unexplained and unexplainable feature of this case is the actual failure of C.U.P.W. to give to Canada Post a piece of paper setting out a grievance on Ms. Miller's behalf. The facts show that the union thought it had filed a grievance and that it pursued the matter up to arbitration and only learned of its mistake (or negligence) the day before the matter was to have been

arbitrated. Despite the lack of precise detail, we cannot come to the conclusion that the failure itself represented a non-caring attitude, perfunctoriness recklessness or anything but a mistake - which did, of course, have unfortunate consequences.

It is well known, and the fact was mentioned by Canada Post's counsel, that C.U.P.W. submitted several score thousand grievances last year. Few of them, of course, were as crucial to the union or the individuals involved as was the unsubmitted matter of Ms. Miller's dismissal. On the other hand, with that volume of paper being fed into the grievance machinery, it is not at all surprising that something might occasionally fall by the wayside.

C.U.P.W.'s system for managing this tremendous volume of grievances does not have any special means of distinguishing between those grievances that are truly critical to individuals and those that are not. The system depends on the competence and assiduity of a relatively small number of officers. It seems strangely crude, bearing in mind the size of C.U.P.W., its resources, its capacity for somewhat greater sophistication and its propensity to generate what seems even to the not unsympathetic observer an horrendous overload of grievances.

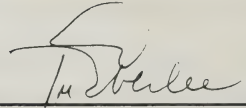
It might be argued that any reasonable person would conclude that the consequence of C.U.P.W. running such a system, and using the system in the way it seems to do, would inevitably be mistakes, some of which would be bound

to have serious consequences; such mistakes, arising inevitably out a system that any reasonable person could recognize as being seriously flawed, would in reality fall into the category of serious negligence.

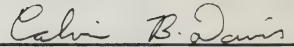
On the other hand, this is the system that the membership of C.U.P.W. has established and tolerates. The Board's jurisprudence in duty of fair representation complaints follows fairly consistently the line that the system adopted by a union is basically its own business; that the Board has no mandate to reform a union system in order to make it more perfect; that the Board's role, in respect of duty of fair representation complaints, is to ensure that the system has worked as it is apparently intended to work, without the complainant's situation being handled outside the norm. Hence, we cannot conclude that simply because of the way C.U.P.W. does business, the instant complaint must be viewed as involving serious negligence on C.U.P.W.'s part, at least in the sense that that concept can be defined in the world of industrial relations.

We are forced to the conclusion in this case that the union's failure is simple negligence in spite of C.U.P.W.'s wish that the matter should be put back on track toward arbitration. We totally sympathize with the predicament in which Ms. Miller finds herself, but we must nevertheless try to be objective in assessing the facts of the situation and measuring them against what we believe

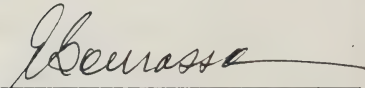
to be the meaning of section 37. We cannot find that the union has violated the section and we must therefore dismiss the complaint.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Evelyn Bourassa
Member of the Board

ISSUED at Ottawa, this 18th day of February 1991.

CLRB/CCRT- 854

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Summary

MICHEL MURRAY, COMPLAINANT, AND
MARITIME EMPLOYERS' ASSOCIATION
AND CERESCORP INC., RESPONDENT
EMPLOYERS.

Board File: 950-131
Decision No.: 855

CA1
L100

-152

Occupational Safety and Health. Complaint pursuant to section 133(1) of the Canada Labour Code (Part II - Occupational Safety and Health). Allegation of violation of section 147(a) of the Code.

The Board ordered the employer to compensate a longshoreman who, after reporting his refusal to work to his employer, had refused to carry out a suitable task assigned to him before this refusal was reported to the safety and health representative.

The Board held that an employer's right to assign a suitable task does not apply at the first step of the investigation. This right exists when the safety officer has been notified pursuant to section 129(1) of the Code.

The Board found that the monetary sanction was imposed on the employee because he had acted in accordance with the Code.

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Résumé de décision

MICHEL MURRAY, PLAIGNANT,
L'ASSOCIATION DES EMPLOYEURS
MARITIMES ET CERESCORP INC.,
EMPLOYEURS INTIMÉS.

Dossier du Conseil: 950-131
N° de décision: 855

Sécurité et santé au travail. Plainte en vertu du paragraphe 133(1) du Code canadien du travail (Partie II - Sécurité et santé au travail). Violation alléguée de l'alinéa 147a) du Code.

Le Conseil a ordonné à l'employeur de dédommager un débardeur qui, ayant fait rapport à l'employeur d'un refus de travail, avait refusé d'effectuer un autre travail convenable, avant que ce refus ne soit effectué auprès du délégué de sécurité et de santé.

Le Conseil a jugé que le droit d'un employeur d'attribuer un autre travail convenable n'existe pas à la première étape de la procédure d'enquête. Ce droit se manifeste lorsque l'agent de sécurité a été notifié conformément au paragraphe 129(1) du Code.

Le Conseil a conclu que la sanction pécuniaire a été imposée au plaignant parce qu'il avait agi conformément au Code.



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Reasons for decision

Michel Murray,

complainant,

and

Maritime Employers' Association
and Cerescorp Inc.,

respondent employers.

Board File: 950-131

The Board was composed of Ms. Evelyn Bourassa, sitting as a single-member panel pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Mr. Luc Martineau, for the complainant; and

Ms. Manon Savard, assisted by Mr. Richard Piechowiak, for the respondents.

I

This decision is further to a hearing, held on May 8 and 9 and August 23 and 24, 1990, into a complaint filed with the Board pursuant to section 133(1) of the Canada Labour Code (Part II - Occupational Safety and Health). Section 133(1) reads as follows:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention."

The complainant, Michel Murray, alleges that the respondents, the Maritime Employers' Association (the MEA) and Cerescorp Inc. (Ceres), contravened the provisions of section 147(a) of the Code by taking disciplinary action against him for exercising his right to refuse to work in

circumstances that, according to him, constituted a danger to his safety inside the hold of a vessel and for insisting that the procedure that applies, under Part II of the Code, with respect to the right to refuse to work, be followed. Section 147(a) reads as follows:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because the employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part;..."

II

On August 16, 1989, the complainant, a longshoreman in the port of Montréal, was assigned to the Ceres terminal to work the 8:00 a.m. to 4:00 p.m. shift as a holdman (PCALE) aboard the vessel Yvan Derbanev, which was being loaded and unloaded using the roll-on/roll-off operation. This type of vessel is equipped with two long holds, without cross-partitions, enabling trucks and cargo hoists to drive right on board the vessel to load or unload containers and cargo.

On Thursday, October 16, 1989, the complainant reported to Section 66 where the vessel was docked, and around 8:15 a.m., began working in the upper hold. Shortly thereafter, claiming there was insufficient lighting in the hold and believing that it was dangerous to work under these

conditions, he informed his foreman, Jean Clermont, of his intention to exercise his right to refuse to work and asked that Richard Piechowiak, the on-duty superintendent for Ceres, be summoned. Mr. Piechowiak met with Mr. Murray and asked him the reasons for his refusal. The complainant told him that he felt there was insufficient lighting in the vessel's hold. Mr. Murray asked for the name of the health and safety committee delegate on duty that day and asked to see him in order to give formal notice of his refusal. Mr. Piechowiak replied that he did not know the delegate's name.

Mr. Murray testified that he exercised his right to refuse to work around 8:45 a.m. and that Mr. Piechowiak arrived some 15 minutes later. After the complainant explained the reasons for his refusal, Mr. Piechowiak said that there was sufficient lighting. The complainant therefore asked that the safety and health delgate be summoned. Mr. Piechowiak told him that he did not know the delegate's name and then asked him to go and work in a shed located near the Yvan Derbanev. Mr. Murray insisted on reporting his refusal to the safety and health delegate in accordance with the provisions of the Code. Mr. Piechowiak then told him that if he refused to report to the shed, he would dock him pay. The complainant again asked to report his refusal to the delegate. Mr. Piechowiak then informed him that he was suspending him for the remainder of the workday. It was 9:00 a.m. Mr. Murray remained in the vessel's hold, waiting to see whether Mr. Piechowiak would return with the delegate. The delegate arrived alone around 9:15 a.m. He informed Mr. Murray that he had been busy with another refusal to work in Section 70 of the port of Montréal. The complainant and the delegate, Denis Wolfe, decided to go to the administrative office of Section 66 and see Mr. Piechowiak. Mr. Murray told Mr. Piechowiak that they

were ready to investigate. However, Mr. Piechowiak told him that he had already been suspended as of 9:00 a.m. and told delegate Wolfe to return to work in Section 68, otherwise he was going to dock him pay too. Faced with this threat, Mr. Wolfe complied.

Some of the facts related above are contested by the employer. According to Mr. Piechowiak's version, there were two meetings, not one, with the complainant. At the first meeting, he told Mr. Murray that he did not know the delegate's name and then left the vessel to obtain this information. During the next few minutes, Mr. Piechowiak testified, he was informed by a walking boss, Mr. Boissonneault, that the safety and health committee delegate was unavailable because he was dealing with a refusal to work by a longshoreman aboard another vessel. It was then agreed that Mr. Boissonneault would ask the delegate to report to Section 66 as soon as he completed his investigation in order to investigate Mr. Murray's refusal to work. Mr. Piechowiak did not ask Mr. Boissonneault the delegate's name. He then telephoned Ceres' administrative assistant, Frank Gower, to inform him of the situation and tell him that the presence of a representative of the MEA was required.

Mr. Piechowiak testified that he returned to the Yvan Derbanev and met with Mr. Murray around 8:55 a.m. He then informed the complainant that the delegate was unavailable and explained why. Not until the second meeting did he order Mr. Murray to go and work in the shed. The complainant refused to comply and insisted on seeing his delegate. Faced with Mr. Murray's repeated refusals to perform safe work pending the arrival of the safety and health committee delegate, Mr. Piechowiak suspended the complainant at 9:00 a.m. This summarizes Mr. Piechowiak's

testimony concerning the circumstances of his meetings and discussions with the complainant.

There is no need to relate in detail subsequent events. Suffice it to say that following the arrival of the MEA's contract administrator, the latter official and delegate Wolfe conducted an investigation in Mr. Murray's absence. A second investigation was conducted when safety officer Germain, who arrived at the scene around 11:50 a.m., asked the employer to sign an assurance of voluntary compliance (AVC). This AVC was issued after Mr. Germain pointed out that the procedures set down in the Code, which required the employer to conduct its investigation in the complainant's presence, had not been followed.

The MEA's contract administrator frankly admitted that he had made a mistake, but that this was purely an oversight. The Board notes that the delegate also failed to invite the complainant to participate in the investigation. The situation was then rectified and another investigation was conducted, this time with Mr. Murray present. On completing the investigation, the employer concluded that the situation that existed in the vessel's hold did not constitute a danger to the complainant. The complainant continued to refuse to work and the safety officer conducted his investigation. He concluded that there was sufficient lighting in the vessel's hold and that there was no danger in this place. Mr. Germain completed his investigation around 3:30 p.m.

Mr. Murray remained at the scene and co-operated with the employer and the safety officer during the various steps of the investigation. He did not leave the work site until the Labour Canada safety officer had completed his investigation. He left with Mr. Auclair's permission. Before

leaving, Mr. Murray asked Mr. Auclair if he was going to be docked pay. Mr. Auclair told him that this decision was not up to him, but to Ceres.

The complainant discovered, on August 24, 1989, that the employer had not paid him, for August 16, for the hours of his shift after 9:00 a.m.

The complainant also received a notice suspending him for the period from September 24 to 30 for failing to report for work at the start of his shift on August 16, 1989. This suspension was subsequently cancelled when the employer discovered that an administrative error had been made in this case: the complainant had in fact reported for work as scheduled.

These are the main facts of the instant case. For reasons on which it will elaborate later, the Board need not determine which version - the complainant's or Mr. Piechowiak's version - is more plausible. One point on which they agree - and this is an important point - is that the complainant insisted on meeting with his delegate. The employer had subsequently imposed a financial penalty on the complainant for having refused to do the reasonable work assigned by the superintendent before he could report to the safety and health delegate.

III

The complainant argues that he was suspended for exercising in good faith his right to refuse to work and for insisting that the employer comply with the procedure in the Code governing the exercise of this right. He invokes the protection of Part II of the Code and is asking that the disciplinary action taken by the employer be rescinded. He

is also asking the Board to order the MEA and Ceres to comply with the procedure in Part II of the Code governing a refusal to work.

The employer denies suspending Mr. Murray because he had exercised a right conferred by Part II of the Code. It suspended him, it alleges, because he was guilty of insubordination in refusing, contrary to the superintendent's order, to do reasonable work in the shed near the Yvan Derbanev, pending the arrival of the safety and health committee delegate. The employer maintains that it applied the principle "no work, no pay."

IV

The employer claims that an employee who exercises his right, under section 128(1) of the Code, to refuse to work because of a danger has no right to refuse to perform reasonable alternate work pending the arrival of a safety and health committee delegate. According to the employer, an employee who refuses to do the work assigned in this situation is guilty of insubordination.

The employer argues that section 129(3) of the Code confirms the employer's right to require the employee who exercises his right to refuse to work elsewhere during the investigation. The Code, it points out, allows the employer to assign the employee to work elsewhere pending the arrival of the safety officer. According to the employer, the scope of section 129(3) must include the first part of the investigation.

To determine whether the employer contravened the provisions of section 147(a) by imposing a financial penalty on Mr. Murray on August 16, 1989, the Board must first answer

this question: can an employee who has exercised his right under the Code refuse to perform reasonable alternate work pending the arrival of the safety and health delegate?

V

The provisions of the Code respecting the right of an employee to refuse to work where a danger exists, and the procedures governing the exercise of this right, are contained in sections 128 and 129 of the Code.

The right of an employee to refuse to perform work or to work in a place that he considers dangerous is conferred by section 128(1):

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

An employee who wishes to exercise his right to refuse must immediately inform his employer and a member of the safety and health committee or the safety and health representative:

"128.(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected.

(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been established or appointed for the work place affected, at least one person selected by the employee.

(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that

(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or

(b) a condition continues to exist in the place that constitutes a danger to the employee,

the employee may continue to refuse to use or operate the machine or thing or to work in that place."

Section 129 stipulates the following:

"129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.

(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not

(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or

(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),

and he shall forthwith notify the employer and the employee of his decision.

(3) Prior to the investigation and decision of a safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternate work, and shall not assign any other employee to use or operate the machine or thing or to work in that place unless that other employee has been advised of the refusal of the employee concerned."

Pursuant to section 128(1), an employee who exercises his right to refuse to work must have reasonable cause to believe that doing the work he refuses to do constitutes a danger to him. The Board dealt with the question of reasonable cause in Alan Miller (1980), 39 di 93; [1980] 2 Can LRBR 344; and 80 CLLC 16,048 (CLRB no. 243), where it said:

"... The absence of an improper motive on the part of the employee activating subsection 82.1(1) notwithstanding, a condition precedent to the right to refuse to work with the protection of the Code is that the employee, in any event, had 'reasonable cause to believe' that imminent danger in the context of that subsection existed at the time of his refusal to work."

(pages 102; 351; and 753)

In the instant case, the Board does not have to decide whether the employee's refusal was based on genuine fears relating to safety and health concerns because the employer did not raise this issue. Moreover, the employer informed the Board that the employee's good faith in exercising his right to refuse to work was not at issue.

The right to refuse to do reasonable alternate work cannot be based, strictly speaking, on the text of section 128(1) of the Code if the employee who refuses does not have reasonable cause to believe that an imminent danger exists at the time he refuses to do the reasonable alternate work. We use the words "strictly speaking" to characterize the situation where section 128(1) is viewed in isolation,

outside the context of sections 128 and 129 of the Code. In the past, the Board has issued decisions that suggest that this way of analysing the subsections of sections 128 and 129 of the Code is not acceptable. In Samuel John Snively (1982), 48 di 93 (CLRB no. 373), the Board said this:

"Part IV [now Part II] of the Code has been designed as a comprehensive, integrated progression of procedures designed to provide protection for employees against injury and health hazards, and its clauses are intended, on a sequential basis, to progress the handling of safety problems through to orderly conclusion. ..."

(page 95)

Section 128(1) and the right to refuse to work must therefore be interpreted in the context of this coherent body of procedures designed to protect employees against health and safety hazards. These procedures include, in section 129(3), an employer's right to require an employee who exercises his right to refuse to work to do reasonable alternate work. It is clear that section 129(3) must also be interpreted in the context of the coherent body of procedures found in sections 128 and 129 of Part II of the Code.

Three aspects of the procedures set down in the Code are relevant to an understanding of the present case and hence an employer's right to require an employee to do reasonable alternate work.

1. The procedures are mandatory. The Board reviewed these procedures in Lila K. Walker et al. (1989), as yet unreported CLRB decision no. 754, in which it said the following:

"... Clearly, the spark required to set all of these mandatory steps in motion is a refusal to work under section 128(1)."

(page 13)

2. Under sections 128(6), 128(7) and 129(1), the employee and the employer must fulfil their obligations forthwith.

Section 128(6) requires the employee to report forthwith the circumstances of the matter to his employer and to a member of the safety and health committee. The purpose of this provision is to formalize the incident so that it can be clearly defined and to proceed quickly to resolve the safety problem. The obligation to report the refusal to a member of the safety and health committee will allow immediate discussions to take place between the interested parties in order to iron out the difficulties.

Section 128(7) requires the employer to investigate forthwith in the presence of the employee and at least one member of the safety and health committee who does not exercise managerial functions. That provision is also designed to expedite the resolution of the safety problem.

Under section 129(1), the employer and the employee must each forthwith notify the safety officer where an employee continues to refuse to work.

Moreover, the right to make a complaint under section 133(1) is subject to the provisions of section 133(3), which stipulates that this right is conditional upon

the employee's complying with sections 128(6) and 129(1).

3. The procedure set down in the Code requires the employee's participation in the first step of this procedure. As we saw earlier, the procedure is triggered by an employee's refusing to work. Next, the employee must report his refusal to his employer and the employer must investigate the report in the employee's presence. Where the employee continues to refuse to work, section 129 requires the employee and the employer to each notify forthwith a safety officer. This marks the end of step one of the procedure. Each action required during this step is taken either by the employee who exercised the right to refuse or in his presence.

Under section 129(1), the employee's presence is no longer mandatory after the completion of step one. As soon as the safety officer is notified by either the employee or the employer, the remaining steps of the procedure set down in section 129 are carried out in the presence of either the employee or his representative.

VI

In this context, the question arises as to whether the power conferred by section 129(3) can be exercised by the employer at any step in the procedure or only prior to the safety officer's investigation. Do the opening words of section 129(3), "Prior to the investigation and decision," mean that an employer can exercise this power at any point in the procedure? We do not believe so. This interpretation could conflict with the coherent body of procedures.

Parliament divided the procedure into two steps. It is clear that the employee's full and complete participation is required during step one. The employee must therefore be available. The actions required during this step must be taken quickly. If, during this step, the employer had the right to require an employee to perform reasonable alternate work, this could prevent the employee's being present during the investigation, especially since at this step of the procedure, the time required to investigate is entirely under the employer's control.

If, following this investigation, the employee continues to refuse to perform the work that, in his opinion, still poses a danger to him, the safety officer is notified. It is at this point that the safety officer's involvement and the second step of the procedure governing the exercise of the right to refuse to work begin. Until the safety officer arrives, and until he has investigated and rendered a decision, the employer can assign the employee to reasonable alternate work. Section 129(3) of the Code unquestionably gives the employer this right in order to minimize the inconvenience to the employer because, in some cases, the safety officer's investigation cannot begin until much later or could last several days. Moreover, the length of this investigation and the point at which the officer renders his decision are not under the employer's control.

VII

The Board's Jurisdiction

The Board's jurisdiction is defined in section 133(1). We subscribe to the analysis the Board did of these provisions in Lila K. Walker et al., supra:

"While I do not wish to cover ground which was examined at length in the earlier interim decision in these proceedings in decision no. 678, I think that it is necessary for the sake of clarity to point out once again that under Part II of the Code an employee's right to complain to the Board is restricted to situations where employers have taken action against an employee in contravention of section 147(a) because the employee has acted in accordance with section 128 or 129. ..."

(page 12)

The Board went on to review the procedures set down in sections 128 and 129 of the Code and added the following:

"... Clearly, the spark required to set all of these mandatory steps in motion is a refusal to work under section 128(1)."

(page 13)

In this case, the complainant clearly exercised his right to refuse to work. More particularly, he tried to comply with his obligation under section 128(6), which he could not do forthwith because the delegate was unavailable. Having refused to obey the employer's order to perform reasonable alternate work, the complainant was thus suspended. It is clear that the effect of the suspension was to interrupt the orderly progression of the procedure set down in the Code. Can one conclude that the employer docked the complainant pay because he invoked section 128?

In John Charters et al. (1989), 76 di 188; and 3 CLRBR (2d) 253 (CLRB no. 727), the employer had taken disciplinary action against certain employees who had exercised their right to refuse, without conducting an investigation.

In upholding the complaint, the Board said this:

"CPC did not fulfil its obligation as an employer under section 128(7). It did not carry out an investigation into the circumstances surrounding the refusals with a view to eliminating or reducing any existing danger. What it did was to short-circuit the whole system by immediately disciplining the refusing employees. This is exactly the type of mischief that section 147 of the Code is designed to prevent. When an employer acts like CPC has here, the Board can only presume that the disciplinary measures were taken because the employees had acted in accordance with the Code. In the circumstances, the Board need not even debate whether the employee correctly interpreted or applied the right to refuse provisions of the Code. By the employer's very actions, the contravention of the Code was a 'fait accompli.'"

(pages 199; and 263)

VIII

Conclusion

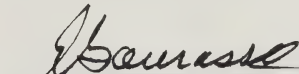
In our opinion, an employee has the right to refuse to perform reasonable alternate work pending the arrival of a safety and health committee delegate. The power of an employer to assign reasonable alternate work does not exist at this step of the procedure. This power is acquired as soon as the safety officer is notified by the employer or the employee. The Code does not require the employee's participation after this point. Moreover, the employer has no control over the time the safety officer requires to carry out his investigation.

In the instant case, the complainant exercised his right to refuse to work and then reported to his foreman. In refusing to perform reasonable alternate work, he clearly stated that he wanted to report to the safety and health committee delegate. The employer suspended him. In our opinion, the instant case is in principle the same as John Charters et al. The employer bypassed the system by immediately imposing a financial penalty on the complainant.

It is this type of act that section 147 of the Code is designed to prevent.

The Board concludes that the financial penalty was imposed because the complainant acted in accordance with the Code. The Board does not even have to determine whether the complainant correctly interpreted or applied the provisions of the Code dealing with the right to refuse to work.

Pursuant to the powers conferred on it by sections 134(c) and (d), the Board orders the employer to pay compensation to Mr. Murray for any pay he lost on August 16, 1989. The Board appoints Ms. Debra Robinson, director of its Montréal regional office, or a person designated by her, to assist the parties in implementing this decision and it retains jurisdiction to settle any other difficulty that might arise.


Evelyn Bourassa
Member of the Board

ISSUED at Ottawa, this 20th day of February 1991.

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Summary

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS,
APPLICANT; BROOKVILLE TRANSPORT
LIMITED, EMPLOYER; AND DAVID ROSE ET
AL., INTERVENERS.

Board File: 555-3127

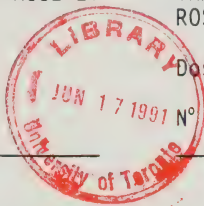
Decision No.: 856

Résumé de Décision

FRATERNITÉ CANADIENNE DES CHEMINOTS,
EMPLOYÉS DES TRANSPORTS ET AUTRES
OUVRIERS, REQUÉRANTE; BROOKVILLE
TRANSPORT LIMITED, EMPLOYEUR; ET DAVID
ROSE ET AUTRES, INTERVENANTS.

Dossier du Conseil: 555-3127

N° de Décision: 856



This is an application for
certification wherein the Board had
to decide whether owner-operators and
other persons driving vehicles under
contract for Brookville Transport
Limited are dependent contractors and
thus employees under the Code.

Il s'agit d'une demande
d'accréditation dans laquelle le
Conseil devait trancher la question
de savoir si les propriétaires-
exploitants et les autres personnes
conduisant des véhicules à contrat
pour Brookville Transport Limited
étaient des entrepreneurs dépendants
et donc des employés au sens du Code.

The Board answered in the affirmative
finding that both owner-operators and
drivers purportedly hired by the
owner-operators are dependent
contractors and are employees of
Brookville Transport Limited for
collective bargaining purposes under
Part I of the Code.

Le Conseil a répondu par
l'affirmative, jugeant que les
propriétaires-exploitants et les
chauffeurs embauchés par ces derniers
étaient des entrepreneurs dépendants
et étaient des employés de Brookville
Transport Limited aux fins de la
négociation collective prévue par la
Partie I du Code.

In its reasons the Board emphasizes
that Parliament chose to regulate
collective bargaining between
dependent contractors and trucking
companies in 1973 with the full
knowledge that they are not employees
in the traditional sense. The
traditional common law tests of
control created by the Courts to
distinguish between employees and
independent contractors are therefore
not determinative when considering
dependent contractor status of owner-
operators in the trucking industry.
The Board also highlights that it is
not traditional employee values that
are the focus of collective bargaining
between owner-operators and trucking
companies; it is the contractual
arrangements under which vehicles are
provided and operated on the trucking
company's behalf.

Dans ses motifs, le Conseil insiste
sur le fait que le Parlement a choisi
de réglementer la négociation
collective entre les entrepreneurs
dépendants et les compagnies de
camionnage en 1973 tout en étant bien
conscient que les premiers ne sont pas
des employés au sens propre du terme.
Les critères de droit commun établis
auparavant par les tribunaux pour
distinguer les employés des
entrepreneurs dépendants ne sont donc
pas déterminants lorsqu'il s'agit de
décider si les propriétaires-
exploitants du secteur du camionnage
ont le statut d'entrepreneur
dépendant. Le Conseil souligne
également que la négociation
collective entre les propriétaires-
exploitants et les compagnies de
camionnage ne porte pas sur les
valeurs auxquelles s'attachent les
employés habituels; elle porte plutôt
sur les dispositions contractuelles
en vertu desquelles les véhicules sont
fournis et exploités au nom de la
compagnie de camionnage.

The Board also dismissed a Charter argument raised by the employer concerning the apparent unequal treatment of dependent contractors under Parts I, II and III of the Code.

Le Conseil a également rejeté l'argument fondé sur la Charte soulevé par l'employeur sur le traitement apparemment injuste des entrepreneurs dépendants dans les Parties I, II et III du Code.

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Reasons for decision

Canadian Brotherhood of Railway,
Transport and General Workers,

applicant,

Brookville Transport Limited,

employer,

and

David Rose et al.,

intervenors.

Board File: 555-3127

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Messrs. Theo N. Stol, Rick Beckwith and Al Maund, for the applicant;

Messrs. George P.L. Filliter and Andrew Rouse, counsel for the employer; and

Mr. Ralph J. Stephen, counsel for the intervenors.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with whether persons who operate vehicles under contract to Brookville Transport Limited (Brookville or the employer) are dependent contractors and thus employees within the meaning of the Canada Labour Code (Part I - Industrial Relations).

This issue arose in an application for certification which was filed with the Board on May 9, 1990 by the Canadian Brotherhood of Railway, Transport and General Workers (CBRT & GW or the union). In the application the CBRT & GW seeks to be certified as the bargaining agent for a bargaining unit of Brookville employees described as:

"all drivers, owner-operators, maintenance employees and terminal employees, including tarpers, at Saint John, New Brunswick, and Toronto, Ontario, excluding office staff, foremen, and those above the rank of foreman"

In response to the application Brookville conceded that it does employ some company drivers as well as maintenance persons and tarpers; however, Brookville took the position that the bulk of its business is operated through "brokers" and "broker drivers" who are not employees of Brookville. The term "brokers" is synonymous with the more common term of owner-operators. These terms are used interchangeably in the industry and where either is used appears to depend purely on geography. In most regions of the country owner-operator is the preferred jargon; in other regions, broker is used. For the purposes of these proceedings we are going to refer to the persons who contract vehicles to Brookville and who operate them, as owner-operators. The reference by Brookville to "broker drivers" means those who drive vehicles provided by owner-operators and who are purportedly hired and paid by the owner-operators. We shall refer to these persons as drivers of owner-operators. It was Brookville's position that the owner-operators affected by this application are independent business people and that drivers of owner-operators are their employees, not Brookville's.

Also in response to the CBRT & GW application, David Rose and some seventy or so owner-operators and drivers of owner-operators filed a petition objecting to the certification of the union as their bargaining agent. In this petition David Rose et al, whom we shall refer to as the intervenors, submitted that union organizers had misled them about the effect of signing union membership cards. The intervenors also submitted that they are not employees of Brookville within the meaning of the Code.

A public hearing was conducted into this application on January 29, 30 and 31, 1991 at Saint John, New Brunswick. The scope of the hearing was limited to the question of who amongst those sought to be represented by the CBRT & GW are dependent contractors and thus employees for the purposes of Part I of the Code.

The intervenors appeared at the hearing and requested that the scope of the hearing be expanded to include evidence supporting their allegations about improprieties in the union's organizing campaign. The Board refused to expand the hearing to matters going to the wishes of the employees, stating that the first logical step was to determine who are employees and what the appropriate bargaining unit is to be. The Board would then turn its mind to the wishes of the employees in the designated bargaining unit. The Board did, however, say that it would allow the intervenors to provide detailed particulars of their allegations of improprieties once an appropriate bargaining unit was determined. The CBRT & GW could then respond and the Board's staff could look into the allegations and report to the Board. The results of this investigation by the Board's officer would be taken into account when the Board is considering whether to conduct a

representation vote to ascertain the wishes of the employees. Following this commitment by the Board, the intervenors took no further part in the hearing.

II

Brookville is in the business of transporting general freight and has operating authorities for all ten provinces and for some forty-eight states in the U.S.A. Its trucking operations extend mainly on triangular routes from New Brunswick to the States to Ontario and back to New Brunswick. Brookville's head office is located at Saint John, N.B. It has regional offices at Boston and Toronto which are primarily used for dispatch and marketing functions. Brookville owns approximately twelve tractors and leases the rest of its fleet of over 100 tractors from owner-operators. Trailers used in Brookville's operations are either owned or leased by Brookville or, in some cases, supplied by customers. Brookville has no terminals per se and it basically provides full truckload services, picking up loaded trailers from the point of origin and delivering them to their destination.

At the outset of the hearing into the issue of employee status, Brookville raised a challenge to the Board's jurisdiction under the Canadian Charter of Rights and Freedoms. Basically what the employer submitted was that the Canada Labour Code, Parts I, II and III treats owner-operators as dependent contractors unequally and that this discriminatory treatment is contrary to section 15(1) of the Charter.

"15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Brookville said that dependent contractors are not included as employees under Parts II and III of the Code and are therefore not entitled to the basic labour standards under Part III or the safety and health protection under Part II. In support of this contention, Brookville relied upon a 1987 memorandum authored by a Mr. H.P. Hansen who we are told is an Assistant Deputy Minister in Labour Canada. This memo is an internal communication dated August 6, 1987 between Mr. Hansen and his Regional Directors. The topic is "Owner-Operators" and the communication read in part:

"SUBJECT Owner-Operators

The purpose of this memorandum is to outline the Operations Program position with respect to the employment status of owner-operators in the trucking industry. Such a position was arrived at following the issuance, recently, of the Owner-Operator task force report.

As a general rule, owner-operators are to be treated as businessmen or independent contractors. As such, they are not subject to Part III of the Code.

From time to time, complaints are likely to be lodged by individual owner-operators. In those cases, Labour Canada's policy to be followed by all the regions will be to inform the complainants that their complaints cannot be accepted since they are considered independent contractors."

For the sake of its Charter argument Brookville made the assumption that owner-operators are also excluded from Part II of the Code because, as we understand it, there is no specific reference to dependent contractors in the definition

of employee in that Part of the Code. Dependent contractors are, of course, included as employees under Part I. It is this unequal treatment of dependent contractors that Brookville says contravenes section 15(1) of the Charter. Brookville pointed out that if the Board was to include owner-operators in the same bargaining unit as traditional employees the union would have to bargain the basic minimum standards for these dependent contractors which the other employees are automatically entitled to under Parts II and III of the Code. In short, Brookville submitted that the exclusion of dependent contractors from Parts II and III constitutes unfair discrimination.

To remedy this situation Brookville suggested that the Board was obliged to use its powers under section 52 of the Constitution Act, 1982 to either strike down Parts II and III of the Code or, strike down the portions of Part I which refer to dependent contractors. We shall return to this Charter argument later in these reasons.

Turning to the issue of who in Brookville's operations are dependent contractors, the theory underlying Brookville's contention that there is no employment relationship between it and those who drive under contract, is twofold. First, Brookville submitted evidence to show that in the trucking industry at large, since deregulation in 1988, where there are no longer the privileged few who hold the necessary authorities, the economic dependency which prevailed prior to deregulation no longer exists. Owner-operators are today in an open market, free to obtain licences and to operate in competition to Brookville. Secondly, Brookville sees itself as being different from the usual run-of-the-mill trucking company; it says that it is more like a transportation broker, arranging services for customers which involve

various modes of transportation other than trucking, including rail, air and sea. Brookville views the owner-operator aspect of its business as independent links in the overall transport pattern.

Brookville presented evidence by way of written submissions supplemented by viva-voce evidence to show that its owner-operators are independent business persons. They are paid on a percentage of gross revenue basis, have their own drivers and are essentially risk-takers, speculators and investors. Brookville spent some considerable time going over the contractual arrangements which it enters into with owner-operators, pointing out the absence of the usual indicia of control, i.e., no mandatory painting of vehicles in Brookville's colours, no operations manual, optional insurance coverage, freedom to maintain their own vehicles, freedom to hire and discipline their own drivers, the option to register their vehicle in their own names rather than as part of Brookville's fleet and, after the first 30 days of the contract, the option to terminate the contract on 24 hours notice and to immediately operate in competition to Brookville. Another example of the lack of control was, according to Brookville, the opportunity to use whatever routes are available to get to their destination. Brookville argued that it is this lack of control, lack of economic dependence and the fluidity of the marketplace that makes these owner-operators independent contractors and thereby not employees within the meaning of the Code.

CBRT & GW on the other hand attempted through its written submissions and oral evidence and argument to convince the Board that the owner-operators and drivers of owner-operators are in fact economically dependent upon and are under the constant control and direction of Brookville. The union

spoke about the compulsory exams and tests for both owner-operators and drivers of owner-operators with Brookville having the final say about who drives the vehicles under contract. In fact, Mr. Al Maund, the union's only witness at the hearing, testified that when he first contracted a vehicle to Brookville, he was not permitted to drive it because of his involvement in a prior accident. The union also advanced evidence through Mr. Maund disputing Brookville's claims about the options open to owner-operators regarding insurance policies and vehicle registration. At the end of the day it became apparent that these options do exist; however, Mr. Maund was not made aware of them and only a few of the owner-operators have ever exercised these options. The CBRT & GW also disputed any claims by Brookville that its owner-operators have freedom to select their own routes. According to the union, all vehicles and drivers are under the constant control and direction of Brookville dispatchers as to what, when and where they pick up and deliver. Even if the drivers, on their own, find an opportunity for a back-haul rather than returning empty, arrangements must be made for the back-haul by Brookville. As for Brookville's contention that it does not have an operations manual which binds owner-operators, the union pointed to a host of memoranda from Brookville to owner-operators which it says is virtually the same as a manual.

While the union conceded that the trucking industry is now operating in a free market environment, it argued strenuously against this Board using deregulation as a consideration when determining dependent contractor status. The union submitted that deregulation has caused owner-operators to work in a much more competitive market in which many are not surviving. Economic dependence is greater today says the union as is the need for collective bargaining for owner-operators to balance

the unfettered right of trucking companies to arbitrarily decide upon conditions to be imposed in owner-operator contracts.

III

Dependent contractor is defined in section 3(1) of the Code as:

"'dependent contractor' means

(a) the owner, purchaser or lessee of a vehicle used for hauling, other than on rails or tracks, livestock, liquids, goods, merchandise or other materials, who is a party to a contract, oral or in writing, under the terms of which he is

(i) required to provide the vehicle by means of which he performs the contract and to operate the vehicle in accordance with the contract, and

(ii) entitled to retain for his own use from time to time any sum of money that remains after the cost of his performance of the contract is deducted from the amount he is paid, in accordance with the contract, for that performance,

(b) a fisherman who, pursuant to an arrangement to which he is a party, is entitled to a percentage or other part of the proceeds of a joint fishing venture in which he participates with other persons, and

(c) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that he is, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person;

A dependent contractor is specifically included in the definition of employee:

"'employee' means any person employed by an employer and includes a dependent contractor ..."

Further, there is special reference in section 3(1) as to what an employer is in respect of a dependent contractor:

"'employer' means

(a) any person who employs one or more employees, and

(b) in respect of a dependent contractor, such person as, in the opinion of the Board, has a relationship with the dependent contractor to such extent that the arrangement that governs the performance of services by the dependent contractor for that person can be the subject of collective bargaining;"

(emphasis added)

It can be seen from the foregoing, and in particular in view of paragraphs (a) and (b) which were inserted in the Code in 1973, that Parliament singled out the trucking and fishing industries for special treatment by extending collective bargaining to persons in these industries who are not necessarily employees in the traditional sense. Back then, collective bargaining was spreading to many areas of society where it had never before been contemplated as a means to settle contractual disputes. Doctors had begun to bargain collectively with provincial authorities over their fee structures; lawyers employed by governments such as crown prosecutors and those affected by legal aid systems used their collective strengths to better their employment conditions and fees. In the sports world, athletes like hockey, baseball and football players were bargaining collectively with team owners and, in the late sixties and early seventies in most jurisdictions, collective bargaining was being extended to many professional groups. In 1973, Parliament obviously decided that it was in the public interest to regulate collective bargaining between economically dependent operators and employers in both the trucking and fishing industries. We emphasize the word

regulate because this is an often overlooked consequence of being included in the Code for collective bargaining purposes. In the interests of industrial peace, the freedom to withdraw services collectively is restricted under the Code to specified open periods which are subject to certain provisions of the Code having been satisfied. The quid pro quo for these restrictions is, of course, the obligation placed upon employers by the Code to participate in collective bargaining and to bargain in good faith to achieve a collective agreement.

In 1984, Parliament enlarged the concept of dependent contractor under the Code by adding paragraph (c) to the definition of dependent contractor and by introducing paragraph (b) into the definition of employer. These additional provisions extended dependent contractor status beyond the trucking and fishing industries and gave the Board the exclusive authority to decide who can be designated as an employer for collective bargaining purposes vis-à-vis dependent contractors.

Considering that this whole notion of extending collective bargaining rights to economically dependent operators regardless of whether they fit within the common law concept of an employee in the traditional sense, has been in the Code since 1973, one would have thought that the issue of who is a dependent contractor in the trucking industry in the federal jurisdiction would have been well settled by now. The instant proceedings, where we are faced with this fundamental question, show that there is still some confusion in the community over this question. Moreover, we are still hearing arguments which are based upon the old master and servant common law concepts of control and whether contracts are for service or of service. With all due respect, it is

our opinion that these tests are no longer determinative when considering dependent contractor status in the trucking industry for the purposes of Part I of the Code. Back in 1974, in Midland Superior Express Ltd. (1974), 4 di 30; [1974] 1 Can LRBR 267; and 74 CLLC 16,104 (CLRBR no. 10) the then Chairman of this Board raised this very question:

"It is in the light of this jurisprudence, of this development in the economic and social realities and of the new legislation that one must ask the question whether there is still a test of 'control' in the common law sense of the term as argued by Counsel for the Respondent to determine the degree of dependency.

It seems to this Board that the retention of the common law control concept would return the question to the general law and render the whole definition in sub-paragraph (a) of 'dependent contractor' in section 107 of the Code (now section 3), virtually nugatory.

...

By introducing this new definition in the Code, Parliament makes it possible to extend bargaining rights to some of these economically dependent persons while assuring that society now has a degree of rule of law to deal with labour disputes involving them.

(pages 38-39; 278; and 16,353; emphasis added)

This panel of the Board agrees with these observations and adopts them to support our contention that the traditional tests of control are not particularly relevant to the issues before us. If we are not dealing with traditional employees why then would we continue to apply the traditional tests which were created by the Courts to distinguish employees from independent contractors?

It seems to us that it should not be overly difficult to identify which category of persons Parliament intended to regulate as dependent contractors in the trucking industry.

They are well defined in the Code. Clearly, it was those who provide vehicles to trucking companies and who operate them under a contract upon which they are economically dependent, and the terms of which can, in the opinion of the Board, be the subject of collective bargaining. If there was any doubt about that when dependent contractors were defined in 1973 there surely could be no room for confusion after the 1984 amendments added paragraph (b) to the definition of employer. This made it abundantly clear that collective bargaining was not to be limited to traditional employee values, it is the arrangements under which the work or services are supplied that is the focus for collective bargaining.

It is our view that the key to determining economic dependence in the trucking industry lies in the guidelines set out by the legislators in paragraph (a) of the definition, i.e.:

- (a) the person is the owner, purchaser or lessee of a vehicle;
- (b) the vehicle is used for hauling livestock, liquids, goods, merchandise, or other materials other than on rails or tracks;
- (c) the person is a party to a contract, oral or in writing;
- (d) the person is required to provide the vehicle by means of which he performs the contract and to operate the vehicle in accordance with the contract; and
- (e) the person is entitled to retain for his own use from time to time any sum of money that remains after the cost of his performance of the contract is deducted from the amount he is paid, in accordance with the contract, for that performance.

Provided that these criteria are met, there is a prima facie presumption of economic dependence and thus dependent contractor status.

There will be, of course, circumstances which would rebut this presumption such as the situation of Mr. Al Maund in this case. Mr. Maund at one time leased three tractors to Brookville but he did not operate any of the vehicles himself; his full-time employment at the time was in the insurance industry. In these circumstances it would be difficult to see how Mr. Maund could be found to be economically dependent on Brookville. Even if he could, we doubt if it would be appropriate to include persons in that situation in a bargaining unit along with other persons who are actually performing work or providing services to Brookville. Several other examples of where economic dependence would be in doubt come to mind; however, all such circumstances will have to be assessed on the particular facts of each case.

Looking at the circumstances before us here, we have little doubt that the owner-operators at Brookville fall squarely into the category of dependent contractor envisaged by the legislators. Notwithstanding the very able presentation on Brookville's behalf, there can be little argument that while vehicles are under contract to Brookville, the owners, purchasers or lessees of these vehicles can only operate them for Brookville and then only under the terms and conditions which are stipulated by Brookville. The evidence also established that all revenues accrued from the operation of the vehicles flow from Brookville. The terms under which these people operate and the remuneration they receive can surely be the subject of collective bargaining. It is our

finding that the owner-operators who are affected by this application for certification are dependent contractors and thereby employees of Brookville for the purposes of Part I of the Code.

IV

Turning now to the drivers of owner-operators, we see no valid reason why these people should be treated differently from the owner-operators for the purposes of Part I of the Code. They are certainly just as economically dependent on Brookville as the owner-operators. They operate vehicles which are under contract to Brookville, on Brookville's behalf and in Brookville's name just as the owner-operators do. The difference is, of course, that they are not direct parties to the contract and they do not supply the vehicles which they operate. They still are, however, an integral component of Brookville's operations. Once they have been approved by Brookville to drive in its name, these drivers are obligated to operate the vehicles and to transport Brookville's customers' goods under terms which are stipulated in the owner-operator contracts as well as in the numerous directives from Brookville which come out periodically in the form of memoranda. Clearly, it is Brookville that these drivers should be negotiating with regard to the terms and conditions under which they operate. The owner-operators who purportedly hire them have little to do with them once they are assigned to a vehicle. Except for the occasional reporting of mileage and other such paperwork, it is really Brookville that drivers of owner-operators deal with on a day-to-day basis.

Prior to the amendments in 1984, the Board took the position on more than one occasion that drivers of owner-operators were in reality employees of the trucking company for which they were providing the services under the contract. (See K.J.R. Associates Ltd. (1979), 36 di 36; and [1979] 2 Can LRBR 445 (CLRB no. 193); and Mercury Tanklines Limited (1984), 55 di 99 (CLRB no. 453)). What is unclear from these decisions which both pre-date the 1984 amendments, is whether the drivers of owner-operators were to be considered to be employees of the trucking companies in the traditional sense. There is no need to seek the answer to that question now as, with the additional powers given to the Board in 1984 vis-à-vis dependent contractors, the authority is clearly there for the Board to find that drivers of owner-operators are dependent contractors and thereby employees of an employer for collective bargaining purposes. Under paragraph (c), which we will repeat for the sake of emphasis,

"(c) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that he is, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person;"

there are no prerequisites to be an owner, purchaser or lessee of a vehicle or to be employed under a contract of employment to qualify as a dependent contractor. All that is necessary is that the person performs work or services for another person under such terms and conditions that renders the person economically dependent and under an obligation to perform the work or services for the other person. In the circumstances here, where drivers of owner-operators virtually sit in the same seat as the owner-operators, they

undoubtedly fall into this category. We find them to be dependent contractors and employees of Brookville under Part I of the Code.

Again, it must be stressed that this does not necessarily mean that these dependent contractors are employees for purposes other than for Part I of the Code. The Labour Canada memorandum of 1978 which we reproduced in part earlier in these reasons is indicative of the approach being taken by some institutions to the status of owner-operators. While we may have some reservations about the broad brush approach taken by Labour Canada in its apparent decree of non-employee status, rather than permitting complaints by owner-operators under Part III to be judged on their own merit, how Labour Canada treats owner-operators in the trucking industry under that part of the Code, has little or no bearing on what is being decided here. Like the owner-operators, drivers of owner-operators are included in Part I to give them the right to negotiate the arrangements under which they operate the vehicles in Brookville's name on a day-to-day basis. This does not mean that these people are suddenly transformed into traditional employees when they decide to exercise their right to bargain collectively under the Code. This topic was addressed by the Board in Canadian Broadcasting Corporation (1987), 70 di 26 (CLRB no. 629) where a trade union alleged that an employer was bargaining in bad faith by insisting on the continuation of individual contracts for freelancers (dependent contractors) after they had been included in a bargaining unit with other employees. Dismissing the union's complaint, the Board said the following:

"To accept the theory that there can be no individual contracts in a collective bargaining regime would be to accept that Parliament intended that dependent contractors would no longer retain that status once they opted for collective bargaining."

Taking the Guild's argument to its logical conclusion, owner operators in the trucking industry who are included in bargaining units with employee drivers would have to turn their vehicles over to their employer and settle for an hourly wage. Fishermen who opted for collective bargaining would routinely become regularly hourly paid or salaried employees of the vessel owners rather than continue to be a party to a joint fishing venture arrangement whereby they work all kinds of hours and receive a percentage of the proceeds of the vessel. More to the point, all of those persons who fall under clause (c) of the definition of dependent contractor which was added to the Code by way of amendment in July 1984, who are employed under arrangements that are somewhat different from the ordinary employee, would no longer be able to continue with those arrangements. ... We cannot see that Parliament so intended."

(pages 37-38; emphasis added)

This fundamental difference between dependent contractors and traditional employees must be recognized and accepted by both employers and trade unions alike. Employers have to acknowledge that they do have an obligation under the Code to bargain collectively with these persons who are an integral part of their operations. Trade unions must be prepared to change their collective bargaining strategies to address the different needs of the dependent contractor. As we pointed out, it is not standard employee values that are at the focus of negotiations here; it is, without limiting the scope of what is negotiable, the contractual arrangements under which vehicles are provided and operated. Collective agreements reached between dependent contractors and their employers need not even resemble standard collective agreements vis-à-vis contents. The only mandatory provisions to be included in such agreements under the Code to our knowledge, are the dispute resolution provisions under section 57. Other than that, the substance of any collective agreement is a matter for the parties. There is simply no need to view or to treat dependent contractors as ordinary employees for collective bargaining purposes.

This difference between regular employees and dependent contractors may cause the Board some concern when it comes to determining appropriate bargaining units. The important question of community of interest is raised when bargaining agents seeks to include dependent contractors in the same unit as regular employees. While we are not dealing with the question of the appropriate bargaining unit at this stage of these proceedings, it is worthwhile to note that in this regard, the Board has no hard and fast rules. The issue of the appropriateness of combined or separate bargaining units for dependent contractors is left strictly to the specific circumstances of each case.

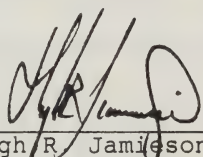
Before closing, we shall deal briefly with the Charter argument raised by Brookville in these proceedings. First, without deciding whether Brookville, as an employer, can properly raise a challenge under section 15 of the Charter, we do agree with Brookville that there is ample authority to support its argument that this Board is a "court of competent jurisdiction" under section 24 of the Charter. However, considering all we have said in these reasons about Parliament's intention to regulate collective bargaining involving dependent contractors as a matter of public interest, we do not see how different treatment of dependent contractors under Parts I, II and III can be viewed as discrimination under section 15 of the Charter. Certainly, the motives behind any apparent unequal treatment are not amongst those listed in section 15 as being discriminatory. Without deciding whether dependent contractors are in fact excluded from Parts II or III of the Code, it is our view that even if they are, this would be a reasonable limit which can be demonstrated as being justifiable in a free and democratic society as provided for in section (1) of the Charter. This Charter issue, which Brookville submitted goes

to the jurisdiction of the Board to deal with the CBRT & GW's application for certification, is, in our respectful opinion, without foundation.

In summary, the Board finds that owner-operators and drivers of owner-operators affected by this application for certification are dependent contractors within the meaning of the Code and are thus employees of Brookville for the purposes of Part I of the Code. The Charter argument raised by Brookville is dismissed.

This application for certification will now be dealt with on its merits through the Board's in-camera process subject, of course, to the commitment made to the intervenors by the Board.

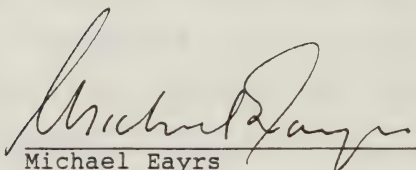
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member

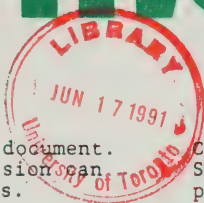


Michael Eayrs
Member

DATED at Ottawa this 1st day of March, 1991.

information

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Summary

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1654 AND LOCAL 1879, APPLICANT UNIONS, AND MARITIME EMPLOYERS' ASSOCIATION, HAMILTON HARBOUR COMMISSIONERS, AND SEAWAY TERMINALS, RESPONDENT EMPLOYERS, AND GODERICH ELEVATORS LIMITED, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, TEAMSTERS LOCAL UNION 939, TEAMSTERS LOCAL UNION 879, UNITED CO-OPERATIVES OF ONTARIO, AND UNITED STEELWORKERS OF AMERICA, INTERVENORS.

Board Files: 530-1790
530-1800

Decision No.: 857

In 1984, the Board declined to establish geographic, "open-ended" bargaining units for the International Longshoremen's Association's stevedoring and checking locals in the Port of Hamilton. In response to new applications from the two locals, 1654 and 1879, and after several days of hearings, the Board concluded that the situation in the port had changed and that such units should now be set up under the terms of section 34 of the Canada Labour Code (Part I - Industrial Relations).

Also under the terms of that section, the Board directed the employers identified through the hearings - the Maritime Employers' Association, the Hamilton Harbour Commissioners and Seaway Terminals - to designate agents to represent them in all employer-union matters vis-à-vis the two bargaining agents.

The Board pointed out that the establishment of the units will infringe only upon employers engaged now, or in the future, in the actual longshoring industry. It will not affect in any way the loading and unloading of ships by companies on their own account, such as Stelco, Dofasco or United Co-Operatives of Ontario, using their own employees.

Résumé de Décision

L'ASSOCIATION INTERNATIONALE DES DÉBARDEURS, SECTIONS LOCALES 1654 ET 1879, SYNDICATS REQUÉRANTS, L'ASSOCIATION DES EMPLOYEURS MARITIMES, HAMILTON HARBOUR COMMISSIONERS ET SEAWAY TERMINALS, EMPLOYEURS INTIMÉS, AINSI QUE GODERICH ELEVATORS LIMITED, L'UNION INTERNATIONALE DES OPÉRATEURS DE MACHINES LOURDES, SECTION LOCALE 793, LES SECTIONS LOCALES 938 ET 879 DES TEAMSTERS, UNITED CO-OPERATIVES OF ONTARIO ET LES MÉTALLURGISTES UNIS D'AMÉRIQUE, INTERVENANTS.

Dossiers du Conseil: 530-1790
530-1800

No de Décision: 857

En 1984, le Conseil a refusé d'établir des unités de négociation géographiques et flexibles pour les sections locales de débarquement et de vérification de l'Association internationale des débardeurs dans le port de Hamilton. En réponse à de nouvelles demandes présentées par les deux sections locales en question (1654 et 1879), et après quelques jours d'audience, le Conseil a conclu que la situation dans le port avait changé et qu'il y avait lieu de créer de telles unités aux termes de l'article 34 du Code canadien du travail (Partie I - Relations du travail).

Le Conseil a ordonné, également en vertu de cet article, aux employeurs reconnus au cours des audiences - l'Association des employeurs maritimes, Hamilton Harbour Commissioners et Seaway Terminals - de désigner des mandataires pour les représenter en matière de relations de travail vis-à-vis des deux agents négociateurs.

Le Conseil a souligné que la création des unités de négociation ne viserait que les employeurs qui oeuvrent ou oeuvreront dans le secteur du débarquement. Elle n'influera aucunement sur les compagnies dont les employés chargent ou déchargent des navires pour leur propre compte, notamment Stelco, Dofasco et United Co-Operatives of Ontario.

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Travail

Reasons for decision

International Longshoremen's
Association, Local 1654
and Local 1879,

applicant unions,

and

Maritime Employers'
Association, Hamilton
Harbour Commissioners, and
Seaway Terminals,

respondent employers,

and

Goderich Elevators Limited,
International Union of
Operating Engineers, Local
793, Teamsters Local Union
938, Teamsters Local Union
879, United Co-Operatives of
Ontario, United Steelworkers
of America,

intervenors.

Board Files: 530-1790
530-1800

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Board Members Calvin B. Davis and Evelyn Bourassa.

Appearances:

Alan Minsky, for the applicant unions, International
Longshoremen's Association, Local 1654 and Local 1879;
Gérard Rochon, for the Maritime Employers' Association;
Bruce W. Binning, for the Hamilton Harbour Commissioners; and
Alain Pilotte, for Seaway Terminals.

The reasons for decision were written by Vice-Chairman
Eberlee.

I

In these applications, the two locals of the International
Longshoremen's Association sought certification orders giving
them bargaining rights for the employees of all employers

engaged now or in the future in the longshoring industry in the Port of Hamilton.

Local 1654 applied to the Board on December 15, 1989 to represent "all employees employed as longshoremen in the longshoring industry in the Port of Hamilton". This was later modified with the addition of the following exceptions: "...save and except the subsisting bargaining rights of Teamsters' Local Union 938 and Teamsters' Local Union No. 879 for any employees of St. Lawrence Warehousing Limited operating as Seaway Terminals engaged in the bulk cargo activities of such company and save and except the subsisting bargaining rights of the International Union of Operating Engineers for any employees of St. Lawrence Warehousing Limited operating as Seaway Terminals."

Local 1879 applied on December 28, 1989 to represent "all employees of employers employed in the checking and transporting of cargo in the longshoring industry in the Port of Hamilton". This was later modified to encompass only "the checking of cargo" and not "the checking and transporting of cargo".

Both locals asserted for the purposes of clarity that their respective applications did not affect or infringe any subsisting bargaining rights in the Port of Hamilton held by the United Steelworkers of America or any of its local unions, nor did they affect or include United Co-Operatives of Ontario with respect to its present activities in the Port.

While the two applications had as their objective the securing of what might be described as open-ended bargaining rights under section 34 of the Canada Labour Code (Part I - Industrial Relations), technically they asked under section

18 for a review and a revision of Board Decision No. 470 (Maritime Employers' Association et al (1984), 56 di 162), which had originally rejected their then applications, and of Board File 555-1977 which gave Local 1654 its current certification.

Section 34 reads as follows:

"34. (1) Where employees are employed in
(a) the long-shoring industry, or
(b) such other industry in such geographic areas may be designated by regulation of the Governor in Council on the recommendation of the Board,

the Board may determine that the employees of two or more employers in such an industry in such a geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

(2) No recommendation under paragraph (1)(b) shall be made by the Board unless, on inquiry, it is satisfied that the employers engaged in an industry in a particular geographic area obtain their employees from a group of employees the members of which are employed from time to time by some or all of those employers.

(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall order that

(a) one agent be appointed by the employers of the employees in the bargaining unit to act on behalf of those employers; and

(b) the agent so appointed be appropriately authorized by the employers to discharge the duties and responsibilities of an employer under this Part."

Section 18 provides as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

A hearing was held by the Board in Toronto on August 15 and

16 and November 19 and 20, 1990. The Board acknowledges the co-operation of the parties for submitting their final arguments in writing when the hearing could not continue on November 21. All arguments were in the Board's hands by late January, 1991.

II

Any description of which employers do what in the Port of Hamilton, and the relationships between them and the two ILA locals, cannot avoid being complex.

Generally speaking, the Port is under the control of the Hamilton Harbour Commissioners. This body, established by Parliament in the early years of this century, has developed, owns and operates most, if not all, of the docks, warehouses and terminals to which general cargo is discharged from vessels or from which such cargo is loaded onto vessels in the Port. Some docks in the Port have been sold outright over the years to such interests as Stelco or Dofasco. Other waterfront areas have been leased to companies like United Co-operatives and Seaway Terminals.

In theory, at least, the Hamilton Harbour Commissioners take sole responsibility - monopolize even - the handling of all incoming or outbound general cargo between land-based modes of conveyance (rail cars and trucks) and the warehouses, terminals and docks. The actual labour involved is done by persons represented by Local 1654 of the I.L.A. who possess the skills of, or are described as, longshoremen, lift truck operators, freight handlers, coopers, shed sweepers, crane operators, signalmen, warehousemen, etc. These persons have no permanent employment attachment to the H.H.C.; they are members of a labour "pool" that serves the H.H.C. and the stevedoring contractors in the Port and are called for work

as and when required.

The actual work of shifting cargo between docks, warehouses or terminals and the hold of a ship tied up at one of the H.H.C. docks is contracted by the shipper involved to one of five stevedoring contractors operating in the Port of Hamilton who are members of the Maritime Employers' Association. For this work, these stevedoring companies also employ persons of the same skills as does the H.H.C. from the Local 1654 labour pool.

On paper at least, and mostly in reality, too, as far as the Board can judge, the Hamilton Harbour Commissioners have exclusive jurisdiction over all checking, clerical, supervisory, and equipment maintenance and repair work done in connection with the movement of cargo on the "land-ward side", for which they take direct responsibility, and as well in connection with the cargo handling done by the stevedoring contractors between docks and ships. They undertake this work by employing people from a separate labour pool provided by Local 1879 of the I.L.A.

The stevedoring contractors who are members of the M.E.A. generally speaking have no major facilities in the Port of Hamilton. Most of them rent small offices from the H.H.C. in the latter's terminals and employ one or two persons to oversee their operations in the Port. Much of the equipment they use - cranes, towmotors and the like - is actually owned and leased to them by the H.H.C.

As has been indicated, Local 1654 people work for both the H.H.C. and the members of the M.E.A. Local 1879 people - in theory, at least - work only for the H.H.C. (More will be said about this later.)

No certification orders exist to provide Local 1654 or Local 1879 with bargaining rights vis à vis the Hamilton Harbour Commissioners. Such rights flow from a single collective agreement between the H.H.C. on the one hand and the two locals on the other. This is Local 1879's only collective agreement.

However, following Board Decision No. 470 and in response to the application in File 555-1977, which has already been referred to, the Board did give Local 1654 a form of section 34 certification for a unit of longshoremen employed by stevedoring contractors who are members of the M.E.A. in the Port of Hamilton. It applies only to stevedoring employers who are, or may become, members of the M.E.A. Local 1654 and the M.E.A. have a collective agreement covering this unit.

Seaway Terminals has been referred to earlier. It has leased property in the Port from the H.H.C. for many years and has a major investment in facilities. Most of its activity has to do with the handling of bulk commodity cargoes. It has a long-standing relationship with both the Teamsters and the International Union of Operating Engineers for various aspects of the work involved in bulk-handling. But it does have a separate collective agreement with Local 1654 covering the employment of longshoremen for certain parts of that work. There is no certification order applying to the unit of employees represented in the bulk-handling operation by Local 1654.

The Board was told that exceptions do arise to the seemingly clear schemology of jurisdictions which has been outlined. For example, upon rare occasions, M.E.A. member contractors have been engaged to unload general cargo elsewhere than onto or from H.H.C. facilities (sometimes this has been at Seaway Terminals facilities) and these contractors have called upon

Local 1879 to provide persons to do the necessary checking and clerical work. In such cases, since no agreement exists between Local 1879 and the M.E.A. members, the latter have used the Local 1654-M.E.A. collective agreement - which currently has better pay rates, in any event, than the Local 1879/Local 1654 - H.H.C. collective agreement. The Board was also told that in a few instances, M.E.A. contractors have been hired by other leaseholders in the Port to unload ships, and they have employed Local 1654 people, but the actual "terminaling" and keeping track of the cargo has been done by the leaseholders' own work forces, with no involvement of Local 1879 (or the H.H.C.). In his testimony, the general manager of the H.H.C. stated that he knew of instances where some tenants of H.H.C. waterfront property had handled cargoes for others for a fee, without using I.L.A. personnel, and he expected more of the same. He did not name names. He did, however, indicate that the H.H.C. had no intention of renting docks to interests that might engage in business to challenge its effort to maintain exclusive jurisdiction over checking and terminaling.

III

In 1984, Local 1654 sought a certification order with a bargaining unit similar to the one applied for here. So did Local 1879. These units would have been open-ended in the sense that any employer (with certain stated exceptions) employing people in the loading and unloading of ships, or the checking of cargoes, whether then or in the future, in the Port of Hamilton, would have been obliged to bargain with either Local 1654 or Local 1879. In response, after a hearing, the Board took the position that the then current longshoring industry collective bargaining machinery in Hamilton was working well, that there was nothing in the offing to suggest that the situation might change and that

there was "no pressing industrial relations advantage for the public interest" in granting the application by Local 1654. The Board concluded that Local 1879 personnel had at that time only one employer - the Hamilton Harbour Commissioners - and, since the 1879 application actually proposed to exclude the H.H.C. from its certification order, and since no other employers of 1879 personnel had been identified to the Board, the Board simply could not entertain the application.

The Board did, as has been stated earlier, certify Local 1654 in 1985 as the bargaining agent for "all employees of member employers of the Maritime Employers' Association employed as longshoremen in the Port of Hamilton". This had the flexibility of making it possible for Local 1654 to claim bargaining rights for any new members of the M.E.A. but was not open-ended in the sense of sweeping in any and all possible future employers of longshoremen in Hamilton who might not wish to become affiliated with the M.E.A.

Since 1985, according to the evidence presented to the Board at the hearing, things have changed somewhat. In 1989, Seaway Terminals, according to the testimony of Philip Webster, the company's Chairman, decided it needed to diversify beyond the bulk-handling business. It entered into discussions with both locals of the I.L.A. looking eventually to the conclusion of collective agreements covering the employment of I.L.A. personnel to handle general cargo. Local 1654 would load and unload ships and do the terminaling work for Seaway, while Local 1879 would provide the checking personnel. The company decided that it would not join the M.E.A. in Hamilton and thus come under the coverage of the existing Local 1654 certification and collective agreement. It felt that by joining to M.E.A. it would be placing its own future too much in the hands of rivals and unduly risking its large investment in facilities in Hamilton.

The I.L.A. locals did not sign the proposed collective agreements with Seaway; instead Local 1654 initiated the instant application, which would have the effect of pulling Seaway into a bargaining structure with the other members of the longshoring industry in Hamilton; Local 1879 also applied for what would be a port-wide bargaining structure covering all present and potential employers of checkers, including the H.H.C. and Seaway Terminals.

With the likelihood of another stevedoring contractor not allied to the M.E.A. entering the scene and making separate collective agreements with the I.L.A. locals, there now appears in prospect on the Hamilton waterfront just the kind of confused and possibly unstable collective bargaining situation that section 34 was intended to prevent. The purpose of this section is to provide for consolidated employer bargaining, thereby minimizing the number of possible friction points and the general potential for instability. It is intended to eliminate the possibility of whip-sawing by a union and destructive under-cutting by employers within an industry based upon collective bargaining or even non-union advantages; it seeks to ensure that the costs and benefits associated with dealing with a single labour pool are equally shared and that the members of that pool have an optimum opportunity to work and earn.

On balance, the Board now believes that the conditions are present to justify the modification of Local 1654's existing certification order along the lines proposed in the application. It will be in the public interest, in view of the stabilizing effect it will have on industrial relations in the Port of Hamilton for the Board to authorize this step. Thus, the Board has decided to amend the existing Local 1654 certificate to provide for a bargaining unit described as:

"All employees of the employers in the longshoring industry in the Port of Hamilton employed as longshoremen save and except the employees of St. Lawrence Warehousing Limited operating as Seaway Terminals who are represented by the International Union of Operating Engineers, Local 793, and who are represented by Teamsters Local Union No. 938 and Teamster's Local Union No. 879 for bulk cargo activities."

We have decided to include in the certificate, language along the lines quoted on page 2 in respect of the applications having no bearing upon either the Steelworkers Union and United Co-operatives. This is for absolute certainty only and does not imply any view on the part of the Board that the companies with which the Steelworkers currently have collective bargaining relationships or that United Co-operatives are part of the longshoring industry.

It must be understood that, in using the term "longshoring industry", in the Port of Hamilton, the Board intends not to draw into the certification order employers who are not in the business of longshoring, but do send out or receive products on their own account via vessels which are loaded or unloaded by their own employees. The intention is to apply the certification order in the Port of Hamilton to those who are in the business of contracting to load or unload ships for others for remuneration. At this time, it will in practice apply only to the M.E.A. members, the H.H.C. and Seaway Terminals. Thus, for example, Stelco, which, as far as we know, is in the steel-making business, does not itself become part of the longshoring industry when its employees unload ore or coal from vessels or alternatively load steel onto ships on its own account. Stelco and the many other similarly situated enterprises that use the Port will not be affected by the Board's decisions. The Board was told that the actual amount of tonnage handled by the

"longshoring industry" in Hamilton is very small; the vast bulk is cargo handled on their own account by firms like Stelco, U.C.O. and many others.

IV

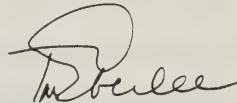
Although, Local 1879 now has a collective agreement with only one employer, the Hamilton Harbour Commissioners, the plan of Seaway Terminals has been to sign an agreement with the local covering the checking aspect of its proposed general cargo business. It is also clear from the evidence adduced at the hearing and referred to earlier in these reasons that Local 1879 personnel do from time to time a small amount of checking work for M.E.A. member companies. Thus the situation which prevailed in 1984 and which caused the Board to dismiss the Local 1879 application at that time no longer exists. More than that, the Board now believes that the conditions are present to warrant the establishment for Local 1879 of a unit under section 34 of the Code described along the following lines:

"All employees of employers employed in the checking of cargo in the longshoring industry in the Port of Hamilton."

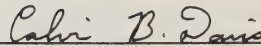
The Board does not deny that the establishment of two across-the-port bargaining structures leaves some questions unanswered in relation to the scope clauses of the existing collective agreements. However, it will be best if these questions are left to the parties for resolution in collective bargaining. The current bargaining scene provides the opportunity for these matters to be dealt with since the existing agreements between the two I.L.A. locals and the M.E.A. members, the H.H.C. and Seaway Terminals have just expired. This is therefore the best point at which to launch the new bargaining structures outlined in the foregoing paragraphs.

So that there may be one voice on the employer side vis à vis the two new bargaining units, it will be necessary for the employers in each case - the M.E.A. members, the Hamilton Harbour Commissioners and Seaway Terminals - to appoint under section 34 an agent to act on their behalf in respect of each unit and to give each agent the authority to discharge the duties and responsibilities of an employer. Pursuant to section 34, the Board orders them to take these steps.

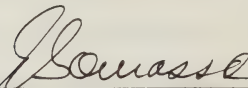
Finally, the assistance of Peter Suchanek, Toronto regional director and registrar, will be available to the parties to implement the Board's orders. The Board will remain seized of the two applications to resolve any problems that may arise.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Evelyn Bourassa
Member of the Board

DATED at Ottawa, this 7th day of March 1991.

information

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Résumé de Décision

JEAN-LOUIS BÉRUBÉ, PLAIGNANT,
CANADIEN NATIONAL, EMPLOYEUR
INTIMÉ.

Dossier du Conseil: 950-167

Décision n^o: 858

La présente décision règle une plainte déposée devant le Conseil en vertu du paragraphe 133(1) et alléguant la violation de l'alinéa 147a) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Le plaignant allègue que son employeur lui a imposé une mesure disciplinaire contraire à l'alinéa 147a) du Code. L'employeur a soulevé une objection préliminaire prétendant que le plaignant n'avait pas droit à la plainte car il n'avait pas respecté le paragraphe 133(3) du Code.

Cette objection a été rejetée, le Conseil considérant que le plaignant a suivi toutes les étapes demandées par l'article 128 jusqu'au moment où l'employeur a décidé qu'il n'était pas en présence d'un différend relevant du Code.

Le Conseil considère que c'est l'employeur qui a dressé les embûches qui ont empêché M. Bérubé de poursuivre son refus.

Après examen de la preuve, le Conseil a conclu que la sanction imposée au plaignant était injustifiée et contraire à l'alinéa 147a) du Code.

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Summary

JEAN-LOUIS BÉRUBÉ, COMPLAINANT,
AND CANADIAN NATIONAL,
RESPONDENT EMPLOYER.

Board File: 950-167

Decision no. 858

This case deals with a complaint filed with the Board pursuant to section 133(1) of the Canada Labour Code (Part II - Occupational Safety and Health), alleging violation of section 147(a).

The complainant alleges that his employer disciplined him in violation of section 147(a) of the Code. The employer raised a preliminary objection claiming that the complainant could not file a complaint because he had not complied with section 133(3) of the Code.

The Board dismissed that objection, having considered that the complainant had gone through all the steps provided in section 128 until the employer decided that it was not faced with a conflict pursuant to the Code.

The Board believes that the employer is the one that put up obstacles preventing Mr. Bérubé from proceeding with his refusal.

After considering the evidence, the Board concluded that the disciplinary action imposed on the complainant was not justified and contravened section 147(a) of the Code.

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Reasons for decision

Jean-Louis Bérubé,
complainant,
and
Canadian National,
respondent employer.
Board File: 950-167

The Board was composed of Mr. J.-Jacques Alary, Member, sitting as a single-member panel pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Mr. Daniel Howe, for the complainant; and
Mr. Raynald Lecavalier, for the employer.

I

This decision deals with a complaint filed with the Board on December 12, 1990 pursuant to section 133(1) alleging violation of section 147(a) of the Canada Labour Code (Part II - Occupational Safety and Health). Jean-Louis Bérubé, the complainant, alleges that his employer, Canadian National (CN), contravened the Canada Labour Code (Part II) as the result of his exercising his right to refuse to work on October 23, 1990. His employer allegedly took disciplinary action against him in violation of section 147(a) of the Code. The Board heard the parties in Montréal on February 28, 1991.

The two sections of the Code to which the complainant refers read as follows:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

...

147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

The employer raised a preliminary objection, claiming that the complainant did not have the right to make a complaint because he had not complied with section 133(3) of the Code which reads as follows:

"133.(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint."

After the parties filed submissions concerning the preliminary objection, the Board announced that it was taking this matter under advisement. Before dealing with this objection and for a better understanding of the context in which the events that gave rise to the present complaint took place, we will begin by relating the facts.

II

The Facts

On October 23, 1990, the complainant, Mr. Bérubé, was working as an acting flinger on the night shift at CN's Pointe Saint-Charles shops. His job consisted in coordinating and ensuring the safe movement of locomotives and parts. These movements are performed using two overhead cranes, with capacities of 200 and 40 tons respectively, depending on the part to be moved. These overhead cranes move across the shop above the pits where machinists work repairing CN's rolling stock. The team that does the moving using the overhead crane consists of four persons: a flinger, a crane operator and two machinists who prepare the load for moving. Once the part is ready to be moved, the flinger signals the crane operator to raise the load to a given height, thus allowing it to move freely above the pits. The flinger then goes to the pit that is to receive the load, making sure as he goes that the path of the overhead crane is cleared of all shop personnel. Once at the receiving pit, the flinger signals the mobile crane operator who starts the moving operation. When a load is moved on the day shift, the flinger returns to the mobile crane and walks ahead of it at a safe distance to ensure that there is no one in its path. This procedure is necessary on the day shift because there are more workers on duty in the shops during the day than at night. Moreover, in order to improve productivity, CN tries, insofar as possible, to move all loads at night, when there are some 10 employees on duty, as compared with the 200 to 300 on duty during the day.

On October 23, 1990, the complainant, Mr. Bérubé, was in charge of moving a locomotive from pit #8 to pit #21, using the 200-ton overhead crane. The locomotive was to be moved at the end of his shift, the night shift, around 7:00 a.m.,

which coincided with the arrival en masse of the workers on the day shift. When the time came to move the load in question, Mr. Bérubé informed his supervisor that he would not move this load because, he said, he did not have time and because this operation, which coincided with the shift change, constituted a danger within the meaning of the Canada Labour Code. He informed his foreman that there were too many workers moving about the work site at that hour. Because of the long distance involved and this throng of workers, he did not feel capable of moving the load in question without endangering the safety of the workers who were reporting for duty and crossing the floor of the motive power shop on their way to their respective work stations. At that time of the day, there were employees everywhere in the shop. According to Mr. Bérubé, these workers are more concerned about reporting to their work stations and do not pay attention to what is going on around them.

A discussion began between Mr. Bérubé and his foreman. After listening to the complainant's reasons for not moving the load, the foreman, Sylvain Brochu, ordered the complainant two or three times to move the load. Mr. Bérubé continued to refuse and informed Mr. Brochu that if he was not happy with the situation, all he had to do was send him to his superior and he could explain the situation to him and he would understand. The discussion ended. Mr. Bérubé shut down the mobile crane and, at the end of his shift, went home. When he returned that evening, his foreman told him to report to the supervisor's office. In the office, a discussion took place between Mr. Bérubé and the supervisor. After hearing the explanation provided by Mr. Bérubé, the supervisor told him that he did not understand why he refused to do the work assigned. When the complainant came out of the office, Mr. Brochu handed him a letter asking him to report, in the company of his union

representative, to the office of Mr. Féat, the shop foreman, in connection with the investigation of the allegation that he was insubordinate to the supervisor, Mr. Brochu. The investigation proceeded. Mr. Bérubé repeated his reasons for refusing to move the load as requested, explaining that the load had to be moved a considerable distance and that, in his opinion, performing this operation at the time that he was asked to do so posed a danger to the other workers. Following this investigation, the complainant received a disciplinary notice informing him that 10 demerit points had been recorded in his file because he was insubordinate to supervisor Brochu on October 23, 1990. This disciplinary action gave rise to Mr. Bérubé's complaint.

III

The Positions of the Parties

The employer stated that it had taken disciplinary action against Mr. Bérubé for refusing to obey an order from foreman Brochu to do work. Mr. Bérubé had no reason to refuse to do this work because a few weeks earlier, he had moved a load around the same time of day. Mr. Bérubé also moved another load some two weeks after the refusal at issue here. Mr. Bérubé did not complete the form required by the employer in case of a refusal. Consequently, argued the foreman and those who had to handle the case, CN was not dealing with a refusal under the Code. CN also alleged that Mr. Bérubé did not comply with the provisions of section 128(6) of the Code that require an employee to report the circumstances of the matter forthwith to his employer and to either a member of the safety and health committee or the safety and health representative. Counsel for CN argued that had Mr. Bérubé been serious about following the proper procedure, he could have asked for the form required by CN in case of a refusal to work and waited until the safety and health representative on the day shift arrived to report the

circumstances of the matter to him. CN alleged that Mr. Bérubé did not meet the requirements of section 128(6) of the Code and that the Board could not therefore entertain this complaint.

Mr. Bérubé, for his part, argued that he tried to exercise his rights under the Code, but that his employer would not let him. He also argued that a few weeks prior to this refusal, he had refused to work and that when he reported for work the following day, he was given the form in question. When he was summoned to the supervisor's office on October 23, 1990, he thought that the supervisor would give him this form, as had happened the last time. This did not happen. Instead, he was told that he would be investigated for insubordination. He argued that he was entitled to refuse to move the load in the circumstances in which he was asked to do so. He also claimed that an incident in 1984, when half of a load he was moving had broken free, had impressed on him the need to be more careful. He submitted that his employer disciplined him because he had exercised a right conferred by the Code.

IV

The Preliminary Objection

We will deal first with the preliminary objection raised by CN, which claims that Mr. Bérubé's complaint is inadmissible because he did not comply with section 128(6) of the Code, compliance with this section being a requirement of section 133(3) of the Code cited earlier. Section 128(6) reads as follows:

"128.(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected."

The evidence reveals that from the very outset, CN did not regard Mr. Bérubé's action as a refusal within the meaning of Part II of the Code. It treated it as a matter involving the application of the collective agreement. CN's attitude reveals that it viewed this incident in this context and not in the context of Part II of the Code. Moreover, the following facts illustrate this point.

- Following his discussion with Mr. Bérubé, Mr. Brochu, his immediate foreman, felt that because the complainant had moved loads before like the one he was asked to move, he had no reason to raise the issue of safety. In Mr. Brochu's opinion, there was no danger within the meaning of the Code. He felt that Mr. Bérubé refused to move the load because he was asked to do so at the end of his shift. Mr. Brochu concluded that the issue here was insubordination and not safety. Moreover, Mr. Brochu told the Board that Mr. Bérubé did not ask to complete the form required by CN in case of a refusal to work, which confirmed his conclusion.
- There was no one on the work site serving in either capacity described in sections 128(6)(a) or (b).
- The supervisor who met with Mr. Bérubé in his office to discuss the incident at the end of the night shift informed the complainant that he did not understand the situation and the reasons for the refusal.

Without investigating further, he ended the discussion.

- When he left the supervisor's office, the foreman handed Mr. Bérubé the notice requiring his presence at the disciplinary investigation. It is clear that the matter had already been decided and that the meeting with the supervisor was unnecessary. It was a case of insubordination pure and simple.
- The investigation followed the procedure set down in the collective agreement. Its purpose was to determine whether there was insubordination, not whether there was a danger within the meaning of the Code.
- The investigation resulted in the imposition of a penalty of 10 demerit points on Mr. Bérubé for insubordination.
- Having exercised his right to refuse to work before, Mr. Bérubé expected, as had happened during his last refusal, that when he reported for duty, his supervisor would give him the refusal form required under CN's procedure so that, as was the case in the past, discussions would begin with a view to launching the investigation that followed a refusal. This did not happen. Instead, Mr. Bérubé was immediately given to understand, through the notice of a disciplinary investigation, that CN considered his action insubordination.

Care must be taken in this case in analysing the circumstances in which section 128(6) was applied. It should be noted that Mr. Bérubé's perception of danger stemmed from the presence of a flood of workers at a very specific time of

the day. Once this rush was over, Mr. Bérubé no longer had any reason to refuse to work. There was therefore no longer any urgency in persisting in his refusal. In these circumstances, Mr. Bérubé, who was at the end of his shift, thought, based on what had happened during his last refusal, that the next step was to meet with the shop supervisor who would give him the form required under CN's procedure. There was no hurry because this could easily be done when he returned to the shop to begin his next shift. Moreover, in the circumstances, Mr. Bérubé could not have reported the matter to the safety representative in the work place because there was no representative.

On the morning of the incident, the employer took no action to ensure that the employee remained at the work site and to resolve the problem. CN, like Mr. Bérubé, waited until the start of the next shift to follow up the refusal. According to the evidence adduced, Mr. Bérubé had taken all the steps required by section 128 until the point at which the employer decided that the dispute was subject, not to the Code (Part II), but to the collective agreement.

Through its action, CN bypassed the application of section 128 from the very outset of the refusal. It is asking the Board to turn a blind eye to its actions and dismiss the complaint on a question of procedure, the application of which CN itself prevented. To grant this request would limit the scope of the Code and prevent the attainment of its objectives. We do not believe that, in requiring that the conditions set down in section 133(3) be met before a complaint can be made under section 133(1), the legislator had this objective in mind.

The Board believes that in the instant case, it was CN that created the obstacles that prevented Mr. Bérubé's pursuing

his refusal and giving the notification required by section 128(6). For this reason, we dismiss the preliminary objection raised by CN.

V

The Decision

The Board has before it a complaint filed by Mr. Bérubé pursuant to section 133(1) alleging a contravention of section 147(a).

In the circumstances of the present case, the Board must ask itself the following question: was CN justified in disciplining Mr. Bérubé because, in its opinion, he had refused to obey an order from his foreman?

Having analysed the evidence, the Board concludes that when the complainant refused to move the load, he discussed the reasons for his refusal with the foreman. Mr. Brochu, the foreman, ordered Mr. Bérubé two or three times to move the load because, he said, loads had been moved before during the day when there were several employees in the pits. According to CN, Mr. Bérubé had no reason to challenge the order. Moreover, foreman Brochu did not believe that Mr. Bérubé's action constituted a refusal to work under Part II of the Code because the complainant had not asked for and completed the form required by CN's written procedure in case of a refusal to work. All these facts, which were reported to the supervisor, plus the ensuing investigation, led CN to conclude that the action it took against Mr. Bérubé was not a disciplinary action of the type prohibited by section 147(a), but rather a disciplinary action for insubordination.

In refusing to move the load, Mr. Bérubé sought to exercise a right conferred by section 128(1) of the Code. According

to him, he was right in believing that moving the load in question endangered the safety of the other employees who were moving about the work place at this busy time when the shift changes. What CN did was to reject Mr. Bérubé's argument, deciding instead to treat his refusal as insubordination and not to follow the procedure set down in section 128 of the Code.

The evidence clearly establishes that the reasons given by the complainant for not moving the load were, rightly or wrongly, reasons of safety and not reasons related to the application of the collective agreement, or reasons other than those set down in Part II of the Code.

Even though CN cited the complainant's claim that he did not have enough time to move the load and pointed to his failure to follow the established procedure, it has not persuaded the Board that these were the reasons that motivated Mr. Bérubé when he refused to carry out the foreman's orders. In the Board's opinion, Mr. Bérubé acted in good faith and believed that moving the load as requested, in the circumstances that prevailed on October 23, 1990, posed a danger to the safety of the other employees (see William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); and Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618)).

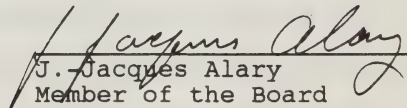
There is no requirement in the Code that an employee who refuses to work complete a form. CN, through its procedure, cannot require more of Mr. Bérubé than the Code requires of him, even if this procedure may help the parties to resolve their differences over safety matters.

In the present case, CN decided immediately that there was no danger within the meaning of the Code, that the reason given by Mr. Bérubé was not valid and that his continued

refusal to work constituted insubordination, when it should have complied with the Code and investigated the situation further.

Having analysed the evidence, the Board concludes that in the instant case, CN, in acting as it did, denied Mr. Bérubé the exercise of a right conferred by the Code and that the penalty it imposed on the complainant for insubordination was ill-founded.

Accordingly, the Board concludes that the penalty imposed on Mr. Bérubé was unwarranted and contrary to section 147(a) of the Code. The Board allows the complaint filed pursuant to section 133(1) and orders CN to remove from Mr. Bérubé's file all references to the penalty imposed on Mr. Bérubé on November 14, 1990 as the result of the incident on October 23, 1990.


J. Jacques Alary
Member of the Board

ISSUED at Ottawa, this 12th day of March 1991.

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SUMMARY

**PATRICK BERRY, COMPLAINANT,
AND CANADA POST CORPORATION,
RESPONDENT EMPLOYER.**

Board File: 950-175

Decision No.: 859

RÉSUMÉ

**PATRICK BERRY, PLAIGNANT, LA
SOCIÉTÉ CANADIENNE DES POSTES,
EMPLOYEUR INTIMÉ.**

Dossier du Conseil : 950-175

Décision n° : 859

A postal clerk was fired by Canada Post Corporation. He alleged that it was because he had filed an earlier complaint under Part II of the Canada Labour Code (Occupational Health and Safety) and had testified at a previous Board hearing. He claimed the dismissal was contrary to section 147(a) of the Code.

The Board found that it did not have jurisdiction to deal with this matter. It pointed out that it can only deal with allegations of violations of section 147(a) where such violations allegedly occurred because the employee invoked the right to refuse work under sections 128 or 129 of the Code. These provisions were not involved in the instant matter. The Board expressed the view that the complainant's appropriate recourse would have been to take his allegations to a safety officer for disposition under other sections of the Code.

Un commis des postes a été congédié par la Société canadienne des postes. Il a allégué que c'était parce qu'il avait précédemment déposé une plainte en vertu du Code canadien du travail (Partie II - Santé et sécurité au travail) et qu'il avait témoigné au cours d'une audience passée du Conseil. Il a prétendu que le congédiement était contraire à l'alinéa 147a) du Code.

Le Conseil a jugé qu'il n'avait pas compétence pour traiter l'affaire. Il a indiqué qu'il ne pouvait traiter les allégations de violation de l'alinéa 147a) que lorsque ces violations se sont prétendument produites parce que l'employé a invoqué son droit de refuser de travailler en vertu des articles 128 et 129 du Code. Ces dispositions n'ont pas été invoquées en l'instance. Le Conseil était d'avis que le recours approprié du plaignant aurait été de porter ces allégations devant un agent de sécurité pour qu'elles soient réglées en vertu d'autres articles du Code.



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Reasons for decision

Patrick Berry,
complainant,
Canada Post Corporation,
respondent employer.

Board File: 950-175

The Board consisted of Vice-Chairman Thomas M. Eberlee, sitting as a single-member panel pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

R. Aaron Rubinoff, assisted by Christina Howard, for the complainant, Patrick Berry; and
Phillip M. Dempsey, assisted by Peter Speak, for the respondent employer, Canada Post Corporation.

These reasons for decision were written by Vice-Chairman Eberlee.

I

At the outset of the hearing of this complaint in Ottawa on March 12, 1991, counsel for Canada Post Corporation argued, among other things, that the Board had no jurisdiction under section 133 of the Canada Labour Code (Part II - Occupational Safety and Health) to deal with this alleged violation of section 147(a). I listened to submissions from both parties and then adjourned the hearing, with the undertaking that I would issue a written decision on the point.

The complainant, Patrick Berry, was a postal clerk in the Ottawa mail processing plant until he was dismissed on December 21, 1990. He complained to the Board pursuant to section 133 of the Code that his termination was in retaliation (contrary to section 147(a)) for an earlier case he had brought to the Board under Part II of the Code and which was heard on September 18 and 28, 1990 and dismissed in Board Decision No. 837, dated December 5, 1990.

Section 147 is described in the marginal note in the Code as "General prohibition re: employer".

It reads as follows:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

(b) fail or neglect to provide

(i) a safety and health committee with any information requested by it pursuant to paragraph 135(6)j), or

(ii) a safety and health representative with any information requested by the representative pursuant to paragraph 136(4)(e)."

Section 133, pursuant to which Mr. Berry filed this complaint with the Board, reads as follows:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) A complaint made pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint referred to in subsection (1) may not be referred by an employee to arbitration.

(5) On receipt of a complaint made under subsection (1), the Board may assist the parties to the complaint to settle the complaint and shall, where it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."

It seems clear from the language of section 133 that the Board has jurisdiction only with respect to the enforcement of section 147(a). (The question here is: how much jurisdiction?) It seems to have no jurisdiction in the enforcement of section 147(b) which says in effect that no employer shall fail or neglect to provide certain information requested by a safety and health committee or

a safety and health representative. My quick impression of the scheme of the statute is that section 147(b) would be enforced by way of a safety officer issuing a direction under the power given to him or her in section 145(1) of the Code. An employer's failure to comply with such a direction would then be subject to a proceeding taken under section 148(1) - subject, of course, to ministerial consent under section 149(1).

II

A brief review of Mr. Berry's situation may be in order. According to Board Decision No. 837, he complained first to the Board around April 3, 1990, alleging that Canada Post Corporation had violated section 147(a) by suspending him for 15 days without pay for refusing a work assignment that he believed to be unsafe. Mr. Berry claimed that his work refusal had been in accordance with section 128 of the Code.

There is no need to reproduce section 128 in full here. The relevant part for these purposes is section 128(1):

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

The Board concluded in Decision No. 837 that Mr. Berry's motivation for the refusal of the work assignment (which led to the suspension) was not related to safety. Thus, the suspension was not contrary to section 147(a). The

Board therefore dismissed the complaint.

In the present complaint, Mr. Berry has alleged that Canada Post punished him - ultimately by way of dismissal - for taking a complaint under Part II of the Code against the corporation to the Board and for testifying at the Board hearing in September, 1990. Mr. Berry's position is that this punishment is contrary to section 147(a) of the Code. I was told that Mr. Berry also considers the dismissal to be contrary to the collective agreement between Canada Post and the Canadian Union of Postal Workers and a grievance to that effect is working its way through their system.

Canada Post, on the other hand claims that the discharge has nothing to do with Mr. Berry's previous complaint to the Board and is its response to a "culminating incident" arising with respect to his work record. Be that as it may, the only Canada Post claim relevant to the matter before the Board at this point is whether I have jurisdiction to hear and determine the present complaint. Canada Post's argument is that the Board can only be involved in dealing with a complaint under section 133 if the employee's allegation is that the employer contravened section 147(a) because the employee has acted in accordance with section 128 or 129. The argument goes on to the effect that neither section 128 nor 129 has been invoked by Mr. Berry, nor do they apply in any way, in the present set of circumstances. The Board therefore cannot entertain the complaint.

Counsel also argued that since section 156(2) says that:

"156(2) The provisions of Part I respecting orders and decisions of and proceedings before the Board under that Part apply in respect of all orders and decisions of and proceedings before the Board or any member thereof under this Part."

and since the dismissal is already the subject of a grievance, the Board has the power to invoke section 98(3) of Part I of the Code so that the matter may be determined at arbitration. Section 98(3) reads as follows:

"98.(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

In connection with the latter argument, I expressed the view at the hearing that I had no power to utilize section 98(3) in respect of a complaint filed pursuant to section 133 since the language of section 98(3) clearly specifies that it has to do only with a complaint filed pursuant to section 97. This continues to be my view.

Counsel for Mr. Berry argued that section 147 clearly prohibits an employer from doing what Mr. Berry alleges it has done, namely punishing him for seeking to enforce his rights under the Code via the earlier complaint and testifying in the proceeding before the Board initiated by that complaint. The reference to section 128 and 129 in 133(1) merely "gives context" to the right to complain; they constitute the starting point. Counsel suggested it did not make sense that any violation of section 147(a), other than one flowing from an employee's invocation of section 128 or 129, would have to be the subject of a prosecution in court.

He said the Board should see Parts I and II of the Code as a unified whole. It could not have been Parliament's intention to give the Board jurisdiction to hear and determine with respect to the unfair labour practice prohibitions of Part I and then to strictly limit the same jurisdiction with respect to the unfair practice

prohibitions of Part II. Parliament could not have intended to tell employers they could not punish employees for exercising rights under Part II and then give them no effective recourse by way of full access to the Board.

Section 97(1) reads as follows:

"97.(1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94 or 95; or

(b) any person has failed to comply with section 96."

It contemplates that any violation of the various unfair labour practice prohibitions of Part I of the Code (which are cited in the section) will be entertainable and capable of being adjudicated by the Board. Mr. Berry's counsel argued that despite the references to section 128 and 129 in the wording of section 133(1), the latter section must be read as operating to allow the Board to deal with any of the unfair labour practices prohibited by section 147(a), on a similar all-inclusive basis to section 97(1), otherwise there would be an inconsistency between the way Parts I and II function - an "absurdity", and "disharmony".

III

Dealing with the latter argument first, I believe that Parts I and II of the Code were intended by Parliament to be different and distinct. For example, Part I has a preamble; Part II has a "purpose" stated in succinct terms in section 122.1. They underline the difference between the two parts. The coverage of Part I is of all federal works, undertakings or businesses. The scope of Part II

is considerably narrower. (See section 123). The definitions of persons and things are different: Part II is broader than Part I in its definition of who is an employee; Part II is somewhat more specific than Part I in defining what is contained in a collective agreement. Even in respect of the handling of unfair practices, each section has a different procedure: under Part I (section 98(1)), the Board is seized (with only minor preconditions) with any complaint when it is filed and ultimately must hear and determine it (again with certain limited exceptions); under Part II (section 133(3)), there are certain fundamental preconditions that must have been met before the Board can deal with an employee complaint respecting a violation of section 147(a): the Board cannot be seized with a complaint where the employee has not first reported his refusal to work at least to the employer (section 128(6)); to the extent possible under the circumstances, the employee must also have sought first to bring in a safety officer to investigate whether danger does actually exist.

Having regard to all of the other obviously intentional and seemingly irreproachable differences between Parts I and II, I do not see how one can properly read out of the language of section 133(1) the words "because the employee has acted in accordance with section 128 or 129" on the ground that they create a difference from Part I (and section 97) which is claimed to be an absurdity or a disharmony.

I believe it is quite clear that only if the alleged violation of section 147(a) was "because the employee has acted in accordance with section 128 or 129" does the Board have the jurisdiction to hear and determine (assuming of

course that the preconditions of 133(2) and (3) have also been met).

I am not alone in interpreting section 133 in this way. My colleague, Vice-Chairman Hugh R. Jamieson, came to the same conclusion in his decision in Lila K. Walker and David W. Bryant, 1988, 73 di 126, Board Decision No. 678.

I do not consider that this interpretation leaves a complainant who believes he or she has been treated in a way contrary to section 147(a) that is not related to sections 128 or 129 without an effective recourse except prosecution. I referred earlier to my view that section 147(b), for which no enforcement scheme is specifically outlined in Part II, would actually be enforced by way of a safety officer issuing a direction under the power given to him or her in section 145(1) of the Code. This reads as follows:

"145.(1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally."

My reading of Part II leads me to conclude that similarly any alleged violation of section 147(a) - except an alleged violation related to the invocation by an employee of his or her rights under sections 128 or 129 - would be capable of being dealt with via a direction under section 145 from a safety officer to correct or remedy the contravention, including, in my view, reinstatement following a dismissal. Such a direction would then be subject to review by a regional safety officer under section 146 and to ultimate enforcement via prosecution under section 148. It may well be that Parliament intended the requirement of ministerial

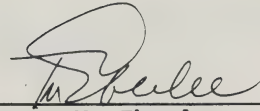
consent for any prosecution taken under Part II so as to insure that a safety officer has an opportunity to issue a direction, if deemed appropriate, in connection with any violation of Part II, before people rush off to the courts. All of the above is simply a long-winded way of saying that I do not think an employee with a non-section 128 or 129 complaint under section 147(a) is in any particular state of disadvantage by not having recourse to the Board.

IV

In this case, Mr. Berry's complaint cannot be viewed as arising because he has acted in accordance with section 128 and 129. He did claim originally, in the complaint that was dealt with in Board Decision No. 837, that his suspension was allegedly due to his invocation of his right to refuse under section 128. That brought the complaint before the Board. The Board decided, however, that he was not suspended because he acted in accordance with section 128 or 129; it dismissed the complaint. That ended that matter.

In the first instance, the Board decided that he did not act in accordance with section 128 or 129; there is no sign that his dismissal now flows from any action in accordance with section 128 or 129. Neither section is involved in any way in the events surrounding his actual dismissal. Nor is it alleged that either section is involved. Perhaps Mr. Berry is right that the dismissal occurred because he earlier acted in accordance with Part II or testified in a proceeding under Part II. But the route to a remedy for him does not go via section 133 when his allegation does not include the essential element that the violation of section 147(a) occurred because he acted in accordance with section 128 or 129.

I have no jurisdiction to deal with this complaint. I am therefore closing the file.

A handwritten signature in dark ink, appearing to read 'T. Eberlee', is written over a horizontal line.

Thomas M. Eberlee
Vice-Chairman

ISSUED at Ottawa, this 18th day of March, 1991.

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RÉSUMÉ

SUMMARY

M'HAMMED SOUFIANE, PLAIGNANT,
LA FRATERNITÉ INTERNATIONALE
DES OUVRIERS EN ÉLECTRICITÉ,
INTIMÉE, ET VIA RAIL CANADA
INC., EMPLOYEUR.

M'HAMMED SOUFIANE,
COMPLAINANT, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, RESPONDENT, AND VIA
RAIL CANADA INC., EMPLOYER.

Dossier du Conseil: 745-3381

Board file: 745-3381

Décision n° 860

Decision n° 860

Le plaignant allègue violation de l'article
37 par son syndicat. Il prétend que ce
dernier a agi de manière arbitraire et
discriminatoire en négligeant ou refusant
de renvoyer son grief de congédiement à
toutes les étapes de la procédure de
règlement des griefs.

The complainant alleged that his union
had violated section 37 of the Code. He
claimed that the union had acted in an
arbitrary and discriminatory manner by
failing or refusing to process his dismissal
grievance through all steps of the
grievance procedure.

Le Conseil, après avoir examiné les
circonstances qui ont mené à la conclusion
d'une entente de prolongation de la
période de probation du plaignant et
celles qui ont mené à son congédiement,
a jugé que le syndicat avait agi d'une
manière contraire au Code dans le
traitement qu'il a réservé au grief.

After examining the circumstances leading
to the agreement of the extension of the
complainant's probationary period and the
circumstances leading to his dismissal,
the Board found that the union had
violated the provisions of the Code by
processing the grievance as it did.



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Reasons for decision

M'hammed Soufiane,

complainant,

and

International Brotherhood
of Electrical Workers,

respondent,

and

VIA Rail Canada Inc.,
employer.

Board File: 745-3381

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Evelyn Bourassa and Mr. François Bastien, Members.

Appearances

Mr. Daniel Payette, for the complainant;

Mr. Harold C. Lehrer, for the respondent, accompanied by Mr. Frank Klamph, General Chairman of System Council no. 33 of the International Brotherhood of Electrical Workers, and Mr. Siedrik Ekisian; and

Mr. Domenic Scalia, for the employer, accompanied by Mr. K.A. Pride, Manager, Labour Relations (shop trades).

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The Proceedings

On October 3, 1989, the Board received from M'hammed Soufiane a complaint of unfair labour practice alleging violation of section 37 of the Code by the International Brotherhood of Electrical Workers (the union or IBEW). The issue this complaint raises is whether the union breached

its duty of fair representation by failing or neglecting to proceed with the complainant's dismissal grievance through all steps of the grievance procedure, including arbitration.

Section 37 reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The Board's labour relations officer conducted a lengthy investigation in this file without, however, obtaining all information that would have enabled the Board to decide this case without a public hearing. The Board therefore heard the parties at a public hearing held on October 9 and November 1, 1990 and January 17 and 22, 1991. At the hearing on November 1, 1990, Harold Lehrer intervened in the proceedings to represent IBEW. The Board informed the parties on this occasion that Mr. Lehrer's presence did not mean that the Board would disregard or review the evidence presented on the first day of the hearing. The Board also reminded IBEW of the request made to it when the hearing adjourned on October 9, namely, to produce all information concerning the application of the grievance procedure with respect to the grievance Mr. Soufiane filed on January 30, 1989. To this end, IBEW called union representatives as witnesses and also asked that Mr. Soufiane be recalled to testify. The complainant offered no evidence in rebuttal.

II

The Facts

Mr. Soufiane was hired by VIA Rail Canada Inc. (VIA Rail) as an electrician in September 1988. He took up his duties

on September 6, 1988 and his employment ended on January 17, 1989. The employer informed him in writing on January 18, 1989 that his performance was unsatisfactory. This notice reads as follows:

"January 18, 1989

*Mr. Soufiane
P.I.N. 242 294
Electrician*

Dear Sir:

Further to the evaluation reports we have received, we are obliged to terminate your employment for the reasons stated in the last evaluation done after 60 days. The level of your performance as evaluated in these reports is not sufficient to keep you in our employ.

Despite this regrettable development, we wish you every success in your future endeavours.

*Jean-Guy Roussel
Shop Foreman
Maintenance Shop*

/ch

*cc: R. Michaud
M. Duclos
D. Vaillancourt
L. Maurice
G. Cyr
J.R. Leblanc
A. Bedrossian"*

(translation)

After receiving this notice, the complainant contacted Frank Klamph, General Chairman of IBEW System Council no. 33, who referred him to Siedrik Ekisian, General Chairman in charge of grievances in Montréal. Mr. Ekisian met with the complainant on January 20 to discuss filing a grievance against this dismissal which was considered unwarranted. The complainant alleged that the employer could not, in the circumstances, terminate his employment on January 17, 1989 for the reasons given at termination, namely, that it still considered him to be on probation. The probationary period of 65 working days, provided for in article 11.1 of the collective agreement, was completed in December 1988. The

complainant also alleged that the agreement to extend his probationary period by 20 days, reached on December 20, 1988 between the IBEW local president, Pierick Perreno, and the shop foreman, Jean-Guy Roussel, was unlawful, contrary to the collective agreement and could not serve as the basis for the employer's decision to dismiss him.

At the January 20 meeting, the complainant gave Mr. Ekisian his statements of earnings and deductions for the period from September 6, 1988 to January 17, 1989. Mr. Ekisian, for his part, obtained from the employer a copy of the December 20 agreement and some of the complainant's daily time reports. Using this information, Mr. Ekisian drafted a grievance that he submitted to the complainant for his approval on January 30, 1989 and filed it with the employer. The purpose of the grievance was to contest the actual procedure the employer followed in terminating the complainant's employment. It challenged the validity of the written agreement of December 20, 1988 and requested that the dismissal be rescinded and that the complainant be reinstated because on January 17, 1989, he had completed his probationary period which ended on December 9, 1988. It was established that Messrs. Soufiane and Ekisian agreed on the intent and purpose of the corrective action requested.

Article 11.1 of the collective agreement allows the employer, with the consent in writing of the IBEW local chairman, to extend an employee's probationary period to a maximum of 130 days. This is the collective agreement provision under which Mr. Perreno concluded with the employer the written agreement to extend Mr. Soufiane's probationary period to permit a fuller evaluation of the complainant's performance. The evidence concerning the circumstances that led to the conclusion of this written agreement is not only contradictory but also unclear on many

points. Messrs. Perreno and Roussel, for their part, stated that they agreed on this extension verbally when they met four or five days before Mr. Soufiane's probationary period was to expire. However, neither was able to give the exact date on which the complainant's probation ended. Moreover, the exact date of their meeting was not established. Neither Mr. Roussel nor Mr. Perreno could say with certainty whether Mr. Soufiane was present at this meeting, although Mr. Roussel testified that he had earlier discussed with the complainant an extension of his probationary period. This discussion, however, took place after Mr. Roussel read the complainant's second evaluation dated December 19, 1988. Mr. Soufiane, for his part, denied being told about or present at a meeting where an extension was apparently discussed or agreed to verbally before the end of his probationary period. He first heard about this extension sometime between December 23 and 26, 1988 when Mr. Perreno informed him of the written agreement of December 20, 1988.

The employer submitted in evidence the complainant's daily time reports for the period from September 6, 1988 until January 17, 1989. They showed the number of days and hours per day worked during this period. These reports appear to establish that Mr. Soufiane had completed 65 eight-hour workdays at the end of his workday on December 12, 1988 at the latest. The employer and IBEW, for their part, admitted that the complainant's probationary period ended not later than this date.

New VIA Rail employees are evaluated three times during their probationary period: after 20, 40 and 60 working days. The complainant's first evaluation was done on October 5, 1988, his second, which should have been done on or about November 1, 1988, on December 19, 1988, and his third and final, which should have been done on or about

December 1, 1988, on January 4, 1989. The employer refers to the final evaluation in its notice of January 18, 1989. No explanation was given as to why Mr. Soufiane's evaluations were not done on schedule. Nor was there any explanation as to why the written agreement extending Mr. Soufiane's probationary period was not concluded until December 20, 1988 when, by the parties' own admission, the probationary period was supposed to have ended not later than December 12, 1988.

The grievance filed on January 30, 1989 was presented by Mr. Ekisian at the first step of the grievance procedure, but not at the subsequent steps. The record does not indicate the reason for this omission. However, in a letter of April 3, 1989 to the employer, IBEW general chairman for the eastern region, Godfrey Grimes, appealed the decision to dismiss Mr. Soufiane and requested a meeting to discuss the matter. At the hearing, the employer admitted that it treated this request as a direct referral of the grievance to the second step, the standard procedure in a dismissal case, despite the apparent expiration of the 14-day time limit.

In practice, Mr. Grimes appears to have reactivated the procedure for contesting the complainant's dismissal by referring to the procedure that applies specifically in cases of dismissal, and the employer apparently did not object.

A meeting with the employer to discuss the Soufiane case took place on April 17, 1989. The union was represented by Mr. Perreno who had signed the agreement, and Mr. Grimes. It was at this meeting that the union representatives first learned of the reasons for the employer's decision and that

Mr. Grimes learned of the agreement of December 20, 1988 extending the complainant's probationary period.

On April 19, 1989, the employer gave the following reply to Mr. Soufiane's grievance:

"April 19, 1989

Mr. Godfrey Grimes
General Chairman, System Council Number 33
International Brotherhood of Electrical Workers
217 Tamarack Court
Oshawa, Ontario
L1J 6L1

Subject: GRIEVANCE - STEP II / SOUFIANE (242294)

The following will constitute the answer at Step II of the procedure for your grievance dated April 3, 1989 (received at our office on April 10) and submitted on behalf of Mr M. Soufiane - PIN: 242294.

Mr Soufiane was under an extension of his probationary period as stated in Agreement #4, and subsequently dismissed.

As stated during our discussion of April 17, it was understood between the I.B.E.W. Union representative at MMC and Management that an extension of the probationary period was necessary to evaluate the performance of Mr Soufiane. The objection of Mr Perrono (Local Chairman) on the following dismissal of Mr Soufiane was that the Corporation did not keep the employee under close supervision and that the dismissal was not, to his point of view, justified.

After discussion with Jean-Guy Roussel (Shop Foreman) who negotiated a thirty (30) days extension of Mr Soufiane's probationary period with Mr Perrono, it was clear that Mr Soufiane, although showing qualities of hard worker, did not have the knowledge nor the qualifications of an electrician and this was easily checked by Mr Roussel himself. The decision to remove Mr Soufiane from the service resulted from a total lack of improvement and abilities to adapt to the railway services.

In light of these facts, it is our contention that Mr Soufiane was discharged for the good reasons and that he was not suitable for our kind of operations at VIA Rail.

For the above mentioned reasons, your grievance is denied.

(signed)

Marc Duclos
Acting Director, Montreal Maintenance Centre"

Mr. Grimes first discussed Mr. Soufiane's grievance with Mr. Ekisian on May 2, 1989. Having regard to the reasons alleged by the employer in its reply, they agreed that Mr. Ekisian should send Mr. Soufiane the following letter:

"6702 Milan BROSSARD
Que. J4Z 2B3

May 2, 1989

Mr. M. Soufiane
5620 deSalaberry, # 24
Montréal, Que. H4J 1J7

Dear Brother:

We attempted to contact you by telephone at 745-4674, but there was no answer. We are therefore writing to inform you that before we can proceed with your grievance, which was initiated on January 30, 1989, at the next step, it is very important that we have in our possession, before May 17, 1989, the deadline, a legal document certifying that you are a qualified electrician.

Fraternally yours,

S. Ekisian
General Chairman

cc: Frank Klamph, System General Chairman"

(translation)

Between May 2 and 19, 1989, the union representatives did not meet or discuss the Soufiane case. The union did not receive a reply to its request by May 17, 1989, as requested, and did not proceed with the grievance to the third step within the time limit specified in the collective agreement.

Mr. Soufiane left the country on February 7, 1989 and returned on May 16, 1989. On January 30, 1989, during his meeting with Mr. Ekisian, he told the latter that he was leaving Quebec for Morocco. He then asked about the remaining steps in the processing of his grievance and told Mr. Ekisian that he could be reached at any time by contacting his brother at the address and telephone number that Mr. Ekisian already knew. Before leaving Quebec in

February, the complainant spoke with Frank Klamph, system general chairman, who told him not to worry about his grievance. He also tried to contact Mr. Ekisian again, just before his departure. On this occasion, he spoke with Mr. Ekisian's wife.

The complainant's brother moved on March 31, 1989 and the complainant did not officially notify the union of where he could be reached. Mr. Soufiane's brother arranged for the change of address and telephone number after the move and both subsequently received telephone calls and mail at the new address. The union stated that it was unable to reach the complainant by telephone within a reasonable period of time and this was why it wrote to him on May 2. The complainant stated that he did not receive this letter and only learned of the outcome of his grievance on his return on May 16, 1989. However, he gave the matter immediate attention and on May 17, 1989 telephoned Frank Klamph for news of his grievance. Mr. Klamph was in hospital and his wife referred the complainant to Godfrey Grimes. This was the first time the complainant dealt with Mr. Grimes. He telephoned him on May 19, discussed his grievance with him, and at Mr. Grimes' suggestion, contacted Georges Cyr, a representative of the employer, to obtain details of his case. Receiving no satisfaction from Mr. Cyr, the complainant again contacted Mr. Grimes by telephone on May 30. He also sent him a registered letter on June 16, 1989 in which he asked him to proceed with his grievance since his approach to Mr. Cyr had been fruitless. In a letter of June 29, 1989 to Mr. Soufiane, Mr. Grimes told the complainant the reasons why VIA Rail was maintaining its position on his grievance, namely, because he possessed neither the knowledge nor the qualifications to work as an electrician, and that it was his responsibility to prove that the employer's allegations were unfounded. He ended

his letter by assuring Mr. Soufiane of the union's support. After this date, the complainant was in contact with various union representatives, including Mr. Ekisian in July 1989, until the end of September 1989 when general chairman Klamph told Mr. Soufiane to contact Mr. Grimes again. It was at that point that the complainant filed his complaint with the Board.

Mr. Grimes explained that the decision not to proceed with Mr. Soufiane's grievance to the third step of the grievance procedure was taken by the representatives of System Council no. 33. Mr. Grimes did not know the date of the meeting at which this decision was taken or whether there was a record of the decision. The evidence, however, established that this meeting took place after May 17, 1989. This decision was taken because the grievance was untimely: the time limit had expired on May 17, 1989, by which date the grievance had not been referred to the third step because Mr. Soufiane had not provided the necessary information concerning his qualifications.

The complainant, for his part, was never officially notified of the union's decision not to proceed with his grievance beyond the second step.

III

The Decision

The intent and purpose of the grievance drafted by the union representative and approved by the complainant in January 1989 are clear: the agreement extending the probationary period is contrary to the provisions of the collective agreement and the dismissal of January 17, 1989, an action which the employer felt justified in taking because the complainant was on probation, is unlawful. The evidence and

the admission of the parties confirm that the calculation of time made by Mr. Ekisian in January 1989 to determine the expiry date of the complainant's probationary period is not unreasonable. This being the case, Mr. Ekisian, an experienced union representative who was then a full-time union official, stated that he was satisfied that the complainant had a legitimate right to grieve and filed the grievance with the employer. Moreover, Mr. Soufiane was satisfied with Mr. Ekisian's handling of this matter and had no criticism of the manner in which the union processed his grievance until January 30, 1989, apart, of course, from the conclusion of the agreement of December 20, 1988, which he contests.

The complainant's criticism, that the union did not defend and pursue his grievance in accordance with its original purpose, has merit. Neither the union nor its representatives defended or argued before the employer the January 30 grievance that sought to rescind the dismissal because of the procedure followed by the employer, a procedure based on a contravention of the collective agreement, namely, the conclusion of the agreement of December 20, 1988. Instead, the union adopted at the first opportunity the employer's position concerning the complainant's knowledge and qualifications. In response to the employer's allegation, it asked him, not for his version of the facts, but for a "legal document" attesting to his qualifications; otherwise, his grievance would be in jeopardy. The complainant's failure to reply to this request by the date indicated was apparently the reason for the decision not to pursue the grievance. However, if this was in fact the reason for the decision, the union would have had to take this decision on or before May 17, 1989. No decision was taken on or before this date. The time simply lapsed. The decision of the representatives of

System Council no. 33, made on an unspecified date that was, however, subsequent to May 17, 1989, was not to proceed with the grievance because it was already untimely. This is vicious circle reasoning. Moreover, Mr. Grimes' inability to pinpoint the date of this meeting and to say whether there was a record of this meeting does nothing to enhance the credibility of the union's version of how it proceeded and of the reasons advanced to justify its conduct.

The union failed or neglected to pursue a dismissal grievance alleging a very specific contravention of the collective agreement for the one and only reason that the complainant himself failed or neglected to provide, when first asked to do so, information that was considered necessary but that did not relate to the original content of the grievance.

It is well established that an employee must assist the union in defending his/her grievance by, among other things, providing the relevant information. (See Craig Harder (1984), 56 di 183; and 84 CLLC 16,043 (CLRB no. 472); and Lionel Arseneault (1988), 74 di 63 (CLRB no. 692).) This principle must stand and the Board does not intend to question it. However, assessing the parties' conduct and applying the "clean-hands" theory must be done on a case-by-case basis. In this case, the union tried to show that the complainant breached his duty to co-operate by either withholding information from it or neglecting to provide it with information. For example, Mr. Ekisian claimed that the complainant did not tell him the whole truth in January 1989, namely, that he knew, before his probationary period expired, of the existence of an agreement (at least a verbal one) to extend this period. This allegation is unfounded. In fact, Mr. Roussel discussed once with the complainant an extension of his

probationary period after he had read the second evaluation dated December 19, 1988. The complainant was absent from work from December 17 to 22, 1988 and the earliest that the discussion could have taken place was therefore December 23, 1988. This, then, confirms the complainant's claim concerning when he was informed of an extension of his probationary period. Mr. Ekisian then alleged that Mr. Soufiane had never provided him with any documents to support his claims. He stated in particular that the statements of earnings and deductions that he had appended to the grievance, showing the number of hours and days worked, were given to him by the employer's human resources department, and not by the complainant on January 20, as the latter claims. There are notes, in the complainant's handwriting, on these statements. These statements could have been provided to the union only by the complainant and could not therefore have come from the employer, as the union claims.

Finally, Mr. Ekisian alleged that since the complainant made no arrangements whereby the union could contact him during his long absence from the country, and since he himself did not contact the union during this absence, he put himself in a situation where he could not reply to the request of May 2, thus creating himself the circumstances that led to the abandoning of his grievance. This allegation is unfounded. Even though the Board noted the complainant's lack of diligence in inquiring as to the progress of his grievance, despite repeated calls to Canada from Morocco, the union's representatives knew that Mr. Soufiane was out of the country and that it might be more difficult to contact him. The union claims that it tried to telephone him, and that when it was unable to reach him, Mr. Ekisian wrote to him on May 2. Mr. Soufiane claims that he never received this letter, although he received other

communications at his new address and telephone number. The complainant's version is credible, otherwise how else can one explain the fact that the first person he telephoned on May 17 was Mr. Klamph, the only union representative with whom he had ever dealt directly concerning his grievance, and not Mr. Ekisian, whose signature was on the letter.

The evidence reveals that the general chairman for the eastern region, Mr. Grimes, went to the meeting on April 17, 1989 to discuss Mr. Soufiane's grievance without having in his possession the information and facts that would have permitted a meaningful discussion of the complainant's claim as set out in his grievance of January 30, 1989. Prior to April 17, he had neither met with nor spoken to Mr. Ekisian or Mr. Perreno.

Mr. Grimes had not read the text of the January 30 grievance because he was not even aware before this meeting began of the agreement extending the probationary period. He himself had not calculated the time in question. When informed of the employer's allegations concerning the complainant's qualifications, he decided to obtain a legal document from Mr. Soufiane, and when he did not obtain it by a certain date, he claimed that he decided on or before May 17 not to pursue the grievance. This claim is not credible. In fact, Mr. Grimes did not speak to Mr. Ekisian until May 19 and could not therefore have known prior to this date whether or not the information requested from the complainant had been provided. Consequently, he could not have decided on or before May 17 whether or not to pursue the grievance.

The Board is satisfied that IBEW's conduct and behaviour in processing the grievance of January 30, 1989 constitutes a breach of the duty of fair representation. The union was well aware of the intent and purpose of the grievance, i.e. to contest the actual procedure followed in dismissing the complainant and the actual form of the dismissal. When it met with the employer on April 17, 1989, it should have had in its possession the information Mr. Ekisian had gathered in January 1989 concerning the dismissal. It did not. However, because the complainant did not produce, as requested, a document on a subject that he and the union had never discussed, the union apparently decided to abandon the grievance solely because the complainant neglected to fulfil his duty to co-operate. The Board believes that in taking this decision, the union refused, contrary to the Code, to examine the complainant's grievance and to defend it objectively, fully and without arbitrariness.

It is not the Board's responsibility to pass judgment on the merits of the grievance or the union's assessment of its merits. However, in order to assess the union's conduct and behaviour in reaching its decision, it will be helpful to examine the main facts of the issue that divides the parties. The Board commented as follows on this matter in Robert Lacoste and Marcel Leduc (1988), 73 di 160; and 89 CLLC 16,001 (CLRB no. 680):

"In short, it is not the substance or the merits of the grievance that matters; the Board examines these aspects to obtain a better understanding of the facts that gave rise to the grievances. This enables the Board to determine the atmosphere, background and setting. What matters is the behaviour of the union and its officers in processing the grievance. This behaviour must be serious, responsible, diligent, and devoid of any arbitrariness, bad faith and discrimination."

(pages 170; and 14,006)

Having regard to this frame of reference, the Board concludes that, in the instant case, the union behaved in an arbitrary and offhanded manner in not taking the appropriate steps to defend the interests of the dismissed complainant and failed to ensure that it represented him in accordance with the requirements of the Code.

Having said this, the Board is not suggesting that the union must refer all grievances to arbitration. It is, however, reaffirming that in processing a dismissal grievance, the union must ensure that it acts, in everything it does, in all seriousness and objectivity (see André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319)).

The union referred to Manual Silva Filipe (1982), 52 di 20; and 2 CLRBR (NS) 84 (CLRB no. 397), involving the parties to this complaint. In that case, the Board held that an agreement between the employer and the union to extend the probationary period did not require the approval of the employee affected and did not constitute a breach of the duty of fair representation. However, there is one important difference between that case and the instant case: there was no doubt in the above-cited case as to when the agreement to extend probationary period was reached. In this sense, that decision has no bearing on the outcome of the present complaint.

During presentation of arguments, the union and the employer requested that, were the complaint to be allowed, Mr. Soufiane's grievance be referred to the third step of the grievance procedure instead of to arbitration. The Board's remedial powers are broad and enable it to refer

directly to arbitration a grievance that has not proceeded through all steps provided for in the collective agreement. In deciding an application for judicial review in Teamsters Union et al. v. Massicotte et al., [1982] 1 S.C.R. 710, the Supreme Court said the following on this subject:

"... However, the Board's wide remedial powers under s. 189, as amended by 1977-78 (Can.), c. 27, s. 68, where it has found a breach of s. 136.1 in the duty of a Union's duty of fair representation, entitled it to permit Massicotte to participate directly in the arbitration through nomination of an arbitrator."

(page 719; emphasis added)

After examining the facts in the instant case, the Board decides to refer the complainant's grievance directly to arbitration.

Counsel for the complainant, for his part, asked the Board to order the union to pay the complainant \$3000 for moral damage, plus the salary he lost between the date of his dismissal and the date of an eventual arbitral award, the contents of this award notwithstanding. These requests for remedial action are in addition to the request that the union be ordered to pay the fees of the complainant's lawyer. The Board has considered the parties' arguments concerning these specific requests. After examining this matter, the Board concludes that there is no reason, in the present case, to deal with the admissibility and merits of these specific requests. However, it is appropriate to refer the parties to the opinion expressed in Cathy Miller (1991), as yet unreported CLRB decision no. 854, regarding the nature of the Board's remedial powers in dealing with a section 37 complaint. After citing the text of sections 99(1) and 99(2), the Board said this:

"We take this to offer the Board in the case of a dismissal, for example, the option of deciding that a union's violation of section 37 shall not be directed to arbitration, with any consequent impact on the employer, but shall fall wholly upon the union in terms of some substantial payment of money to compensate for the loss suffered by a person by the fact that his or her grievance was mishandled contrary to the Code and the person has no job. Of course, such a remedy would be unconventional in relation to what has been the practice of the Board, but it is nevertheless possible to speculate that it might well be a valid approach in the appropriate set of circumstances.

This train of speculation also gives rise to the thought that a union which was accused of violating section 37 and was desirous of actually settling the matter to the mutual satisfaction of itself and the complainant could well look at the possibility of offering appropriate financial compensation. This would obviate the need of a union to seek the goodwill of the respondent employer and/or the judgment of the Board and the adjudication of an arbitrator to get the matter resolved. Of course, it might be utterly impractical in most cases because union treasuries are not over-endowed with funds."

(page 11)

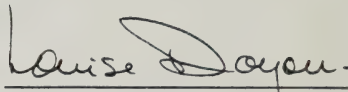
Moreover, counsel for the union suggested that the Board cannot order payment of the reasonable fees of the lawyer who represented the complainant before the Board. This remedy can be granted by the Board under the powers conferred on it by the Code. (See in this regard André Gagnon (1986), 63 di 194 (CLRB no. 547); and Jean-Pierre Levac (1986), 64 di 176; and 86 CLLC 16,044 (CLRB no. 565).) The Board also has the power to decide that a union that has breached its duty of fair representation must pay the salary lost between dismissal and the date of the Board's decision (see David Allan Crouch (1983), 55 di 48 (CLRB no. 449); and Thomas Zuk and Gloria Linfield (1985), 62 di 167; and 85 CLLC 16,060 (CLRB no. 531)).

For all these reasons, the Board allows the complaint and therefore orders the following.

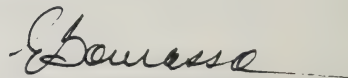
- The union must immediately refer to arbitration Mr. Soufiane's dismissal grievance of January 30, 1989 so that the arbitrator can decide the merits of his grievance having regard to the provisions of the collective agreement. To this end, the Board waives the time limit provided in the collective agreement for referring this grievance to arbitration.
- The union must pay the legal fees and the reasonable expenses incurred by the complainant in order to be represented in this proceeding.
- The union must pay the legal fees and the reasonable expenses that will be incurred by the complainant for the preparation of his grievance and the hearing of the said grievance before the arbitrator, should the complainant decide not to be represented by the union's lawyer at arbitration.
- The union must co-operate with the complainant and his lawyer to ensure that the grievance is decided without delay.
- Should the arbitrator order the reinstatement of the complainant and the payment of compensation, the union must assume the cost of this compensation for the period between the dismissal and the date of this decision.

The Board shall retain jurisdiction over any question that might arise in implementing this decision and appoints Ms. Debra Robinson, director of its Montréal regional office, or any person she may designate, to assist the parties, as required.

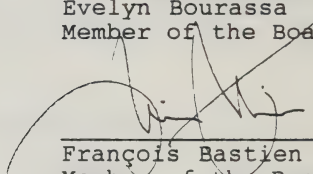
This is a unanimous decision.



Louise Doyon
Vice-Chair



Evelyn Bourassa
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 21st day of March 1991.

CCRT/CLRB - 860

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Summary

PAUL HORSLEY, TOM PEARCE, MICHAEL
MULLIGAN, GORDON DUNPHY, KEITH STUART,
PETER LIM, DAVID STUTT, AND DALE
PETERSON, COMPLAINANTS, AND CANADIAN
UNION OF POSTAL WORKERS, RESPONDENT.

Board File: 745-3713

Decision No.: 861

Résumé de Décision

PAUL HORSLEY, TOM PEARCE, MICHAEL
MULLIGAN, GORDON DUNPHY, KEITH STUART,
PETER LIM, DAVID STUTT ET DALE
PETERSON, PLAIGNANTS, AINSI QUE LE
SYNDICAT DES POSTIERS DU CANADA,
INTIMÉ.

Dossier du Conseil: 745-3713

N° de Décision: 861



Paul Horsley et al complained to the
Board that the Canadian Union of
Postal Workers (CUPW) had violated
certain provisions of the Code by
expelling them from membership in the
union for life because they refused
to relinquish their memberships in the
Letter Carriers' Union of Canada
(LCUC). CUPW denied the allegations
claiming that the complainants were
disciplined and expelled because they
refused to remove themselves from a
conflict of interest position created
by holding shop steward offices in
CUPW while maintaining membership in
the LCUC which had been declared to
be a rival union that was engaged in
raid activities against CUPW.

Paul Horsley et autres ont déposé
auprès du Conseil une plainte
alléguant que le Syndicat des postiers
du Canada (SPC) avait enfreint
certaines dispositions du Code en les
expulsant du syndicat parce qu'ils
refusaient de renoncer à leur carte
de membre de l'Union des facteurs du
Canada (UFC). Le SPC a nié les
allégations, selon lesquelles les
plaignants avaient été disciplinés et
expulsés parce qu'ils refusaient de
s'écarter d'une situation de conflit
d'intérêt découlant du fait qu'ils
occupaient des postes de délégués
syndicaux du SPC tout en conservant
leur carte de membre de l'UFC. Cette
dernière avait été déclarée une rivale
qui participait à des activités de
maraudage contre le SPC.

The complaints were allowed. In its
reasons the Board briefly reviews the
criteria to be applied when dealing
with complaints of this nature and
goes on to find that in the absence
of evidence of actual anti-CUPW raid
activities on the complainants' part
the National Executive Board of CUPW
and its internal Appeal Board had
acted arbitrarily and unreasonably and
had therefore applied the union's
discipline standards to the
complainants in a discriminatory
manner. In the circumstances the
Board found that CUPW's actions
infringed upon the fundamental freedom
of association of the complainants.

Les plaintes ont été accueillies.
Dans ses motifs, le Conseil a
brièvement passé en revue les critères
applicables dans le cas de plaintes
de ce genre. Il juge que, en
l'absence de preuve de véritables
activités de maraudage contre le SPC
de la part des plaignants, le conseil
exécutif national du SPC et sa
commission d'appel ont agi de façon
arbitraire et déraisonnable et ont
donc appliqué les normes de discipline
du syndicat de façon discriminatoire
à l'égard des plaignants. Dans les
circonstances, le Conseil juge que les
actions du SPC portaient atteinte à
la liberté d'association fondamentale
des plaignants.

As a remedy the Board ordered CUPW to
rescind the discipline taken against
the complainants and to reinstate them
into membership in the union.

À titre de redressement, le Conseil
ordonne au SPC d'annuler les mesures
disciplinaires imposées aux plaignants
et de les réintégrer dans les rangs
du syndicat.

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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Paul Horsley,
Tom Pearce,
Michael Mulligan,
Gordon Dunphy,
Keith Stuart,
Peter Lim,
David Stutt, and
Dale Peterson,

complainants,

and

Canadian Union of
Postal Workers,

respondent.

Board File: 745-3713

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Shona A. Moore and Cheryl A. MacDonald, for the complainants; and

Stuart Rush, for the respondent.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with a complaint from Paul Horsley et al (the complainants) who allege that the Canadian Union of Postal Workers (CUPW or the union) had contravened sections 95(f), (g) and (h) and also section 96 of the Canada Labour Code by expelling them from membership in CUPW for life because they refused to relinquish their memberships in the Letter Carriers' Union of Canada (LCUC).

The complainants had joined CUPW after a merger of the LCUC and CUPW bargaining units which had been ordered by this Board in 1988. Following a representation vote, CUPW took over the bargaining rights for the merged bargaining unit in February 1989. The complainants, who were shop stewards in the LCUC structures, continued in that capacity on CUPW's behalf after the union inherited the LCUC collective agreement.

Following a public declaration in August 1989 by the LCUC that it was about to use all means possible to regain its bargaining rights, CUPW embarked on a campaign to eliminate what it saw as conflict of interest amongst those who held CUPW offices and who retained membership in the now rival union, the LCUC. By then, many ex-LCUC officers had been elected to executive positions in CUPW and others, like the complainants, occupied offices such as shop stewards.

At first, CUPW invited those who held union offices to voluntarily relinquish their LCUC memberships. Many did; those who did not were immediately suspended from office and charged under the union's constitution. Disciplinary hearings followed in the various regions across the country and, while a few charges were dismissed, in the majority of cases the charges of conflict of interest were upheld. The complainants, whose charges were heard by the Pacific Regional Disciplinary Committee, were removed from office. The committee's findings, which were released during December 1989 and January 1990, were reproduced in capsulized form in the Board's investigating officer's report:

"...the committee orders the (8) brothers removed from any and all offices within C.U.P.W. This action resolves the declared conflict of interest while allowing them to participate in local affairs. If in the future the brothers can adhere to the wishes of the NEB they may again stand for office."

The "NEB" referred to in the disciplinary committee's decision is the National Executive Board of CUPW which consists of fifteen top officials of the union including National President, 1st National Vice-President, National Secretary-Treasurer, National Chief Steward, 2nd National Vice-President, 3rd National Vice-President, 4th National Vice-President, National Grievance Officer, and seven National Directors.

Under amendments to the union's constitution which were adopted in March 1989, the NEB of CUPW was given the right to appeal decisions of regional disciplinary committees to a newly created Appeal Board. On February 7, 1990 the NEB exercised this right by commencing appeal proceedings against the penalties imposed on the complainants by the Pacific Regional Disciplinary Committee which the NEB viewed as being too lenient. The NEB sought expulsion from the union. These appeals were heard by the Appeal Board in May 1990. The appeals were allowed and the complainants were expelled from the union by the Appeal Board.

CUPW denied that its actions contravened the Code and a public hearing was conducted into these matters at Vancouver on February 20-22, 1991. At this hearing it was confirmed that one of the original complainants, Mr. Al Pocius, had withdrawn his complaint. The charges against him had been dismissed by the Pacific Regional Disciplinary Committee and the NEB had not appealed this decision.

II

Before dealing with the merit of these complaints we shall briefly review the provisions of the Code which are alleged to have been violated and look at the approach the Board has taken with complaints of this nature in the past. First, the relevant sections of the Code:

"95. No trade union or person acting on behalf of a trade union shall

...

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;

(h) expel or suspend an employee from membership in the trade union or take disciplinary action against or impose any form of penalty on an employee by reason of that employee having refused to perform an act that is contrary to this Part;" ...

Obviously, sections 95(f) and (g) are directed at internal affairs of trade unions and in recognition of a reluctance to interfere in internal union matters, Parliament provided an opportunity for union members and trade unions to resolve this type of dispute through unions' internal appeal processes. To this end, section 97(4) prohibits complaints alleging violations of these sections of the Code from being brought to the Board until internal appeal procedures have been exhausted:

"97.(4) Subject to subsection (5), no complaint shall be made to the Board under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 95(f) or (g) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access;

(b) the trade union

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

(ii) has not, within six months after the date on which the complainant first presented his grievance or appeal pursuant to paragraph (a), dealt with the grievance or appeal; and

(c) the complaint is made to the Board not later than ninety days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint."

Exceptions are contained in subsection (5) of 97:

"97.(5) The Board may, on application to it by a complainant, hear a complaint in respect of an alleged failure by a trade union to comply with paragraph 95(f) or (g) that has not been presented as a grievance or appeal to the trade union, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the trade union has not given the complainant ready access to a grievance or appeal procedure."

It was conceded by the parties to these complaints that the internal appeal processes in CUPW's constitution have been exhausted, therefore, section 97(4) is not a bar to the Board dealing with them; however, we thought that it would be helpful to refer to these provisions to capture the full intent of the legislation. Clearly the mischief sought to

be caught by these sections is discriminatory abuse of internal disciplinary powers. The Board is not to sit in appeal from decisions made by trade union disciplinary bodies. This was made clear by the Board in Ronald Wheadon et al. (1983), 54 di 134; 5 CLRBR (NS) 192; and 84 CLLC 16,004 (CLRB no. 445) where the Board expressed its view of what its role is in this type of complaint and set out what it expected from trade unions that were responding to complaints under these sections of the Code from their members:

"It should be made very clear that this Board is not an appeal body from internal union discipline. The role of the Board under section 185(g) (now section 95(g)) of the Code is to ensure that discipline standards, which includes the basis for their application, the manner in which they have been applied and the results of their application, are free from discriminatory practices. In performing that task the Board shall not, as stated previously, apply a standard that would negate the informality provided for in the constitutions of some trade unions. What the Board does expect though, are realistic, human and plausible explanations from trade unions for their conduct."

(pages 150; 209; and 14,036-14,037;
emphasis added)

In the same decision, the Board also reviewed the standards it would be applying when dealing with complaints under sections 95(f) and (g). For our purposes here, it is only necessary to zero in on what is meant by "discriminatory" in the context of these sections:

"... this Board endorses the criteria set down by Mr. Innis Christie, then Chairman of the Nova Scotia Labour Relations Board, when he said in Daniel Joseph McCarthy and International Brotherhood of Electrical Workers [1978] 2 Can LRBR 105, at p. 108:

'In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A

distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S. 1969, c.11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made.'"

(pages 146; 205; and 14,034; emphasis added)

Although the above quote refers only to membership rules, the rationale is equally applicable to the standards of discipline referred to in section 95(g).

The Board has acknowledged the right of trade unions to protect themselves in raid situations in James Carbin (1984), 59 di 109; and 85 CLLC 16,013 (CLRB no. 492). In that case a union member was actively engaged in promoting a rival union by soliciting and signing up members for the raiding union. Dismissing the complaint that the resulting expulsion from the incumbent union violated the Code, the Board said:

"We must dismiss Mr. Carbin's contention that his expulsion from the IAM somehow infringes on his rights under section 110 (now section 8) of the Code. He was not forced to join that union, he did so of his own volition some 20 years ago. In so doing, he exercised his freedom to join the trade union of his choice but, at the same time, he voluntarily subjected himself to the IAM Constitution. He has now had a change of heart for whatever reason and has once again exercised his basic freedom when he joined the CSU. He was not disciplined for joining the CSU, it was for the actions that followed when he attempted to undermine the IAM's position as bargaining agent. James Carbin was not unfamiliar with the contents of the IAM Constitution, he held several responsible union offices during his 20 year membership. Before he set out on a course that he surely must have known would bring down the wrath of loyal IAM supporters upon him, he could just as easily have resigned from that union. He chose not to and, in those circumstances, his expulsion from the IAM does not offend any public interests in the scheme of the Code. The evidence before us does not support the

suggestion that the IAM intended to prevent him from joining or maintaining his membership in the CSU, and certainly there is nothing to substantiate a charge that the union sought to coerce or intimidate him in a manner contemplated by section 186 (now section 96) of the Code to cease to be a member of a trade union.

There was no evidence before us that James Carbin had been singled out for special treatment. We know that at least three other members of the Winnipeg local were dealt with in a similar manner. Two did not complain, one did. Mr. Robert Ages later withdrew his complaint (Board file #745-1734).

Taking into account all of the circumstances, there is nothing before the Board that would cause us to intervene in what is essentially an internal trade union matter. The complaints are therefore dismissed."

(pages 120; and 14,081; emphasis added)

The basic freedoms referred to in that excerpt are, of course, those found in section 8 of the Code:

"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

This is probably an appropriate time to note that the Industrial Relations Council of British Columbia concurred with the approach taken by this Board in James Carbin, supra, when it spoke about the loyalty commanded by a trade union from its members and the necessity for a trade union to be able to protect itself in the face of disloyalty in Garrett et al and United Brotherhood of Carpenters and Joiners of America, Local 452 (1988), 19 CLRBR (NS) 312:

"In the Panel's opinion, a trade union must be able to command, by any lawful means, the loyalty of its members. A trade union must also be able to protect itself from disloyalty by the penalty of expulsion. The complainants, by signing an oath of membership, agreed to be bound by the terms of Local 452's constitution and to use every legitimate means to procure employment for fellow members. Membership in the GWU is inconsistent with both of these promises. The evidence is uncontradicted that the interests,

purposes and objects of the GWU are inimical to those of Local 452. Just as a labour community would not expect an employer to invite a competitor into the boardroom, we should not expect a trade union to continue to offer the benefits of membership to persons who become members of a rival organization. This is particularly true where members have unrestricted access to sensitive, confidential information which may be of significant value to a rival union."

(pages 325-326)

We have reproduced the foregoing passage from Garrett et al, supra, mainly because it was quoted in the written reasons of CUPW's internal Appeal Board in each of its decisions which resulted in the expulsion of the complainants.

Particularly relevant to the instant complaints is the right of a trade union to expel persons from its membership. This right has previously been recognized by this Board:

"In administering and interpreting sections 185(f) and (g) (now sections 95(f) and (g)) the Board must start from some basic premises. First, the sections are intended to protect and advance individual rights against the previously unfettered authority of the union organization. Second, they do not abolish the right of the union to expel, suspend or discipline members or deny membership to non-members."

(Fred J. Solly (1981), 43 di 29; [1981] 2 Can LRBR 245; and 81 CLLC 16,089 (CLRB no. 296) at pages 44; 256; and 14,781; emphasis added)

This principle is not contested in these proceedings. Counsel for the complainants conceded this at the outset of the hearing.

Finally, to complete this brief review, section 96 of the Code which the complainants also referred to is but one of the unfair labour practice provisions in the Code aimed at protecting the basic freedoms in section 8 of the Code:

"96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

One obvious question that will have to be answered here, if we ever get to that point, is whether a trade union can be a person for the purposes of section 96, keeping in mind that these complaints are against CUPW as an entity and not against any individually named persons.

III

What is troublesome about this whole matter is CUPW's insistence that the complainants give up their membership in the LCUC which is undoubtedly the trade union of their choice. This of course instantly smacks of infringement on the fundamental freedom of association of the complainants contained in section 8 of the Code which we referred to earlier. The basic right of individuals to belong to the trade union of their choice and to participate in its lawful activities has been described by the Board in the past as being the cornerstone upon which the Code is founded. This fundamental freedom is sacrosanct and it cannot be infringed upon by employers, trade unions, or by any person. This panel of the Board does, however, concur with the rationale expressed by the Board in James Carbin, supra, therefore we have approached these complaints extremely aware of the need to attempt to strike a balance between the individual rights of the complainants and the rights of CUPW to manage its own affairs and to protect itself in a raid situation.

We fully understand that it is CUPW memberships that have been taken away from the complainants, not LCUC memberships and the question may be asked how this infringes upon the basic rights of the complainants. What has to be kept in mind here is that under the Code employees do have the right to attempt to change their bargaining agent from time to time or to revoke the bargaining rights of the incumbent bargaining agent and to revert to non-union status if this is what the majority of the employees in a bargaining unit desire. There are specific open periods provided for in the scheme of the Code to accommodate these activities by employees and it goes without saying that these activities are a lawful exercise of the fundamental freedoms enshrined in the Code and are protected as such. If the complainants have been disciplined and penalized for refusing to give up their basic freedom, this in itself is surely contrary to section 95(g) of the Code, particularly if CUPW has sought to achieve an unlawful goal by applying the standards of discipline of the union to the complainants in a discriminatory manner.

From that starting point let us go right to what we see as the crux of these complaints, i.e., the conduct of the NEB and the Appeal Board after the complainants had been removed from their shop steward offices by the Pacific Regional Disciplinary Committee. Up to that point it seems to us that CUPW's actions were mostly a matter of internal union affairs with little or no public interest. The complainants tell us that if the matter had ended there they would not in all likelihood have complained. While they were still insistent that they had done nothing to warrant discipline and removal from office, they were reluctantly resigned to accept their fate. Like the complainants, the Board has little or no problem with how CUPW and particularly how the Pacific

Regional Disciplinary Committee handled the perceived conflict of interest situation. It did not escape us though that even at that stage the focus of the NEB's attention was on mandatory resignation from the LCUC. However, the Regional Committee acknowledged the right of the complainants under the Code to retain their LCUC memberships and simply dealt with the conflict of interest situation by removing them from office. In fact, if one looks back on the sequence of events, the conflict of interest concerns of CUPW vis-à-vis the complainants had been alleviated back in early October 1989 when they had been suspended from office by the National President when they first refused to resign from the LCUC.

Why then would the NEB take its appeal and push for the maximum penalty under the union's constitution when the complainants had by then been placed in the same position as thousands of others in the CUPW bargaining unit who held dual memberships in CUPW and the LCUC? It was admitted at the hearing that dual membership in itself is not an offence under the CUPW constitution. No disciplinary action was taken against the rank and file CUPW members for retaining LCUC memberships so why take extraordinary steps against the complainants who were then rank and file members? It was this focus on the LCUC memberships of the complainants and the harsh penalties imposed upon them at the Appeal Board level that caused us to wonder about the true motives behind the NEB's insistence on such a drastic penalty in light of the circumstances, which we shall now turn to.

To CUPW's credit, the union did attempt to live up to the Board's expectations for a plausible explanation for its actions as set out in Ronald Wheadon et al., supra, in that it called Mr. Larry Honeybourne, the union's Pacific Regional

Grievance Officer, and Mr. Bill Fowler, the Chairperson of the internal Appeal Board, to explain the sequence of events and the rationale behind the union's conduct. Both these persons played a key role in the actions taken against the complainants. Mr. Honeybourne had been a member of a special committee which was struck to consider and advise NEB of how to deal with the LCUC members who held offices in the union as well as other matters related to the pending LCUC raid. He also acted for the union in prosecuting the charges against the complainants before the Pacific Regional Disciplinary Committee. Mr. Fowler, as his title suggests, was the person who chaired the Appeal Board which heard and dealt with the NEB appeal that resulted in the lifetime expulsion of the complainants from CUPW. Mr. Fowler also chaired similar appeals which had been initiated by the NEB in other regions of the country.

Both of these witnesses were forthright in their testimony and they obviously believed deeply in what CUPW had done to protect itself and, there was absolutely no doubt in their minds that anyone who was a threat to CUPW's bargaining rights had to be dealt with severely. During their testimony, they referred to the grave nature of the charges against the complainants and that they had been found guilty of the most serious offence and how they deserved the capital punishment of internal union discipline - expulsion. At times, when they let their guard down, one could almost feel the underlying passion and outright hostility towards the LCUC and particularly against the LCUC "power base" which is the name adopted by the group of LCUC officials who spearheaded the movement to oust CUPW. In fact, the whole thrust of CUPW's presentation was directed at the LCUC attempts to regain its bargaining rights. At the end of the day, however, when the dust settled, there was little or no

evidence to show that any of the complainants had been actively involved in any raid activities prior to having been removed from their shop steward offices by the regional disciplinary committee.

The four complainants who testified before the Board all admitted openly that they would prefer to return to the days when they had their own bargaining unit with the LCUC as their bargaining agent. They did say, however, that they had not allowed this to interfere with how they conducted their business as CUPW shop stewards. Their first concern was to represent the membership in their day-to-day dealings with Canada Post. This was certainly supported by the findings of the Pacific Regional Disciplinary Committee which clearly stated in each of its written decisions affecting the complainants that the committee could find no evidence of wilful action against CUPW on the part of any of the accused. Indeed, the committee stated that it believed that the complainants had represented their members to the best of their ability.

Much of the evidence presented to the Board by CUPW against the complainants went to circumstances after they had been charged and tried for alleged conflict of interest. Some were said to have attended an LCUC power base meeting at Vancouver in January, 1990. This was not denied by the complainants who were there. Mr. Paul Horsley for example, explained that not only does he have a sentimental attachment to the LCUC, he also has a vested interest. There was at the time and still is, a question of how some twenty-odd million dollar assets of the LCUC are to be disposed of if the affairs of that union were to be wound up. Mr. Horsley said that it was important to him and other LCUC members to retain their memberships if, for nothing else, to eventually have

a say in how these assets are to be dispersed. Another complainant, Mr. Michael Mulligan, was said to have been acting against CUPW because he was a delegate at the LCUC convention at Sudbury in August 1989 where the motion to regain LCUC bargaining rights was adopted. Anti-CUPW activities were insinuated here because Mr. Mulligan openly admitted that he had not opposed the motion. Other futile attempts were made by CUPW through cross-examination to involve the complainants in the distribution of LCUC propaganda while they were CUPW shop stewards. Nothing of substance came of this except that a couple of complainants did admit to some involvement on the LCUC's behalf but again, this was after they had been charged, tried, convicted and removed from office.

In these circumstances, we must accept for our purposes that there was no evidence of any actual anti-CUPW activities by the complainants before the Appeal Board when that body decided to expel the complainants for life. This had to be so, considering the finding of the Pacific Regional Disciplinary Committee and the evidence of Chairperson Fowler who admitted that there was no new evidence before the Appeal Board. It is this absence of evidence of individual raid activities by the complainants that sets this case apart from the situation in James Carbin, supra, where Mr. Carbin was expelled for actively promoting a rival union. Had the complainants here been charged and found guilty of actively engaging in pro-LCUC raiding conduct under the appropriate provisions of CUPW's constitution we could have perhaps understood the NEB pursuing its appeal and the extraordinary penalty meted out by the Appeal Board. However, as the evidence stands, we have some difficulty even understanding the exact nature of what witnesses Honeybourne and Fowler described as the grave and most serious offences the

complainants were supposed to have committed and which were still being pursued by the NEB and the Appeal Board long after the potential for conflict of interest had been removed. As we said earlier, the totality of CUPW's evidence went to the LCUC attempts to regain its bargaining rights. It was on these activities that Messrs. Honeybourne and Fowler concentrated when they spoke with feeling about CUPW's right to command total and absolute loyalty from its members. Reference was also made by these witnesses to the oath of allegiance taken by all persons who joined the union and, it was argued that the complainants had somehow broken this solemn oath by their disloyal conduct.

We have problems connecting all of this alleged misconduct to the actual charges against the complainants considering the incontrovertible evidence as to what facts were before the Appeal Board when it made its decisions to expel the complainants for life. While it is not clear from the documentation we have before us that the complainants were ever notified prior to their trials of the specific provisions of the constitution they were alleged to have breached, other than for a general reference to Article 8 which covers a multitude of sins, it does become clear from the written decisions of the Pacific Regional Disciplinary Committee that they were found guilty of contravening article 8.01(12) which provides:

"8.01 (12) having refused to comply with a constitutional order of the National President, National Executive Board or National Executive Committee."

The Appeal Board decisions are not quite as clear because it referred only to Article 8.01 of the constitution without indicating the specific subsection. However, there can be

no doubt that the Appeal Board was merely concurring with the guilty finding of the regional committee. That finding had not been appealed, it was only the penalty that had been challenged. What is clear though is that the complainants were neither charged nor found guilty of participating in LCUC raid activities. This is what the NEB and the Appeal Board appears to have lost sight of.

Just what was this constitutional order that the complainants were found guilty of not complying with? Without quoting it verbatim, it was to remove themselves from the conflict of interest position that the NEB had declared them to be in by resigning from the LCUC. Again, we see this emphasis on the LCUC membership and it becomes readily apparent that the target of CUPW's disciplinary action was the LCUC membership of the complainants rather than the conflict of interest problems that the union claimed. Complainant Paul Horsley testified that he had offered to step down from his shop steward office when he appeared before the Pacific Regional Disciplinary Committee but that was not enough to have the charges against him dropped. The only way to avoid discipline was to resign from the LCUC. Obviously it was the denunciation of the LCUC that CUPW was after and this is a clear infringement upon the basic freedoms of the complainants under section 8 of the Code. This is also another key distinction between this case and James Carbin, supra. There, the incumbent bargaining agent disciplined Mr. Carbin for participating in raid activities, not because of non-compliance with an ultimatum that he give up his membership in the rival union.

In the circumstances here, where we did not hear directly from any member of the NEB who was responsible for pushing the appeal to its limits, we can only draw the inference that

the NEB was caught up in the same anti-LCUC hostility that was displayed by witnesses Honeybourne and Fowler during their testimony before the Board and, in their anxiety to defend CUPW's representational rights at all costs, the NEB and the Appeal Board simply went too far. In the absence of any plausible explanation to the contrary, we can only conclude that the NEB wanted to make an example of the complainants at the height of the raid campaign to send an implicit message to other ex-LCUC personnel not to support the LCUC in the raid. It probably also had something to do with the fact that the LCUC was busily engaged in a nationwide drive to re-sign its members and have them pay a \$5.00 initiation fee that is required under the Board's Regulations to get its raid application off the ground. This is what CUPW obviously wanted to discourage. Either of these motives is enough to remove this whole matter from the realm of internal union affairs and bring it into the public interest domain. As we said earlier, attempting to change bargaining agents is a lawful activity under the Code and CUPW surely must have been aware that it was setting out on a precarious path when it chose to focus on mandatory relinquishment of membership in a rival union rather than on individual anti-CUPW raid activities which are clearly covered by article 8.01(d) of its constitution.

Be that as it may, we are more than satisfied that the penalty of lifetime expulsion sought by the NEB through its appeal and which was ultimately imposed by the Appeal Board bore no fair or reasonable relationship to the actual charges or to the evidence against the complainants. This of course runs afoul of the concept of "discriminatory" that was adopted by the Board in Ronald Wheadon et al., supra. In this regard, the actions of CUPW can only be described as arbitrary and unreasonable.

IV

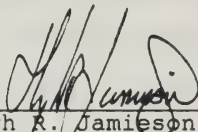
The finding of the Board is that CUPW, by the actions of the NEB and the Appeal Board has taken disciplinary action against the complainants and has imposed a penalty upon them by applying the standards of discipline of the union to the complainants in a discriminatory manner and has therefore violated section 95(g) of the Code. Having so found, sufficient remedial powers under section 99 are available to rectify this situation, therefore, we see no need to deal with the other sections of the Code which were alleged to have been breached. In particular, we need not answer the question of whether CUPW can be a person for the purposes of section 96 of the Code.

As a remedy the complainants asked only that they be reinstated as members of CUPW so that they can participate in the union's activities which affect their daily employment. This request is granted and CUPW is hereby ordered to rescind the disciplinary action taken by its Appeal Board against the complainants and to reinstate them immediately into membership in the union.

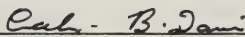
To ensure that there is no confusion when we refer to the reinstatement of the complainants, we mean all eight persons named in the style of cause of these reasons. This point was argued at the close of the hearing when CUPW moved to dismiss the complaints of Keith Stuart, Peter Lim, David Stutt and Dale Peterson because they had not been called to testify before the Board. This motion is rejected and the Board accepts the submission of counsel for the complainants that all eight were represented throughout the whole process and that there was no need to call everyone as the

documentation on file refers to them all and it reveals similar facts and identical treatment of all eight complainants by CUPW. The findings and the remedy, therefore, affect all eight complainants.

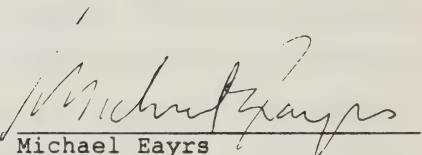
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 26th day of March, 1991.

information

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SUMMARY

Louise Arbour, complainant, Communications and Electrical Workers of Canada (CLC-QFL), union, and National Pagette Limited, respondent employer.

Board File: 745-3679

Decision No.: 862

An employee, Ms. Louise Arbour, was fired by National Pagette Limited on May 7, 1990. She alleged that this action violated section 94(3)(a) of the Canada Labour Code (Part I - Industrial Relations).

The Board granted the complaint. It found that the employer did not establish that its decision was based solely on reasons not related to the exercise of union activities. A lack of specific remedial action by the employer vis-à-vis her alleged shortcomings, notably her lateness and attitude during the period ending April 26, 1990, date on which she joined the union, as well as the employer's somewhat sudden change of attitude regarding the same after that date are among the factors considered by the Board in its decision. The Board ordered that the complainant be reinstated.

RÉSUMÉ

Louise Arbour, plaignante, le Syndicat des travailleurs et travailleuses en communication et en électricité du Canada (CTC-FTQ), syndicat, et National Pagette Limitée, employeur intimé.

Dossier du Conseil: 745-3679

Décision n°: 862

M^{me} Louise Arbour, une employée de la compagnie National Pagette Limitée, a été congédiée le 7 mai 1990. Elle a allégué que son congédiement constituait une violation de l'alinéa 94(3)a) du Code canadien du travail (Partie I - Relations du travail).

Le Conseil a fait droit à sa plainte puisqu'il estime que l'employeur n'a pas réussi à démontrer que ses motifs n'étaient pas entachés de sentiment antisyndical. Le manque de mesures précises de la part de l'employeur pour parer aux prétendues carences de l'employée, notamment en matière de ponctualité et d'attitude au travail, pendant la période se terminant le 26 avril 1990, date à laquelle celle-ci est devenue membre du syndicat, ainsi que le durcissement un peu subit de la réaction de l'employeur après cette date à l'endroit des mêmes manquements comptent parmi les facteurs retenus par le Conseil dans sa décision. Le Conseil ordonne la réintégration de la plaignante dans ses fonctions.



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Reasons for decision

Louise Arbour,

complainant,

and

National Pagette Ltd.,

employer,

and

Communications and Electrical
Workers of Canada (CLC-QFL),
union.

Board File: 745-3679

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Ginette Gosselin and Mr. François Bastien, Members.

Appearances:

Mr. Pierre Grenier, accompanied by the complainant; and Mr. Robert D. Watson and Ms. Sylvie Graton, accompanied by Ms. Louise Bissonnette, regional manager.

These reasons for decision were written by Mr. François Bastien, Member. They are further to an earlier decision (no. 836) in which the Board explained the reasons why it decided that National Pagette Ltd. was a federal business within the meaning of section 2 of the Canada Labour Code and that it had jurisdiction to hear on the merits three complaints of unfair labour practice (files 745-3679, 745-3680 and 745-3681).

When the hearing into these three complaints resumed on December 17, 1990, counsel for the union sought leave from the Board to withdraw files 745-3680 and 745-3681. The Board granted leave the following day. The instant complaint was heard in Montréal on December 17 and 18, 1990 and January 7, 8 and 10, 1991.

I

The Issue

Louise Arbour, who had been employed by National Pagette since February 19, 1990 as a customer service representative, filed with the Board a complaint of unfair labour practice alleging that the employer had contravened the Canada Labour Code by dismissing her for engaging in union activities.

The employer, for its part, claimed that it merely exercised its legitimate prerogatives when it decided to terminate the employment relationship before the end of Louise Arbour's probationary period. Her work performance and attitude did not meet the employer's legitimate expectations and requirements. The employer informed the complainant of her dismissal on May 7, 1990, in a memorandum that reads as follows:

"TO: Louise Arbour
FROM: Jean Bernier
DATE: May 7, 1990
SUBJECT: Job performance

Louise,

We have discussed before your late arrivals in the morning and your lack of punctuality during the lunch hour. There has been no improvement in your behaviour in this regard.

We note, with regret, that you do not appear to be happy at National Pagette, which may explain your lack of interest and motivation and the difficulties you are having adapting to our team approach.

- (1) Your conduct on the morning of Tuesday, May 1; and*
- (2) Your conduct during the remainder of the week, namely on:*

Wednesday, May 2: You did not notify your supervisor that you were not reporting for work. Our receptionist gave us the message you left for us, namely, that you would be absent that day owing to an accident.

Thursday, May 3: You did not report for work and did not notify your supervisor of your absence.

Friday, May 4: We received your doctor's certificate and you still did not contact your supervisor.

These events of last week are one more indication of the malaise that we wish to bring to your attention.

After slightly more than two months in our employ, Louise, we are satisfied that for the good of everyone (at the present time, we are both wasting our time), we must terminate your employment with National Pagette Ltd.

We wish to thank you, Louise, for your services and we are confident that you will soon find an employer that can better meet your professional expectations.

We wish you all the best.

Sincerely,

Jean Bernier
Supervisor, Customer Service
/dq"

(translation)

II

The Evidence

The employer's evidence and arguments can be summarized as follows.

- 1 - The complainant, Louise Arbour, was hired as a customer service representative following an interview in Montréal with Yves Ménard, National Pagette's customer service manager. Her résumé was given to the regional manager, Louise Bissonnette, by a friend of the complainant's mother who used to work with Ms. Bissonnette. In accepting this new position, Ms. Arbour had to leave her job in Trois-Rivières and accept a cut in pay in order, she said, to seek new challenges. At the interview, the manager had also pointed out to the applicant that the salary scale would be reviewed and a new scale announced by the Toronto office in March.

- 2 - The complainant's first week in her new job was devoted to training as a representative. She completed her first real working day on February 27. She was then assigned to customer service. She worked on a team comprising five persons who performed both customer sales and service functions either by telephone or by serving customers in person at a service counter located on the ground floor of the building housing the company's offices. The office of the supervisor of customer service, Jean Bernier, to whom Ms. Arbour reported, was on the 8th floor of the same building.
- 3 - Three members of the team were assigned to customer service and the other two to sales, following a rotation that, in theory, changed every two weeks. In fact, an assignment in customer sales or service often either exceeded two weeks or was much shorter, depending on immediate needs and availability of team members. As a rule, hours of work were from 8:30 a.m. to 4:30 p.m. for service representatives, and from 9:00 a.m. to 5:00 p.m. for sales personnel. During the period in question here, customer service hours were extended until 5:30 p.m. for a few weeks, which meant that service representatives had then to report for work at 9:30 a.m. Team members had an hour for lunch, which they took between 11:30 a.m. and 1:30 p.m., depending on personal preferences, professional and operational requirements, and arrangements made between team members. No provision was made for coffee breaks.
- 4 - Ms. Arbour's tardiness began during her second actual week of work, on or about March 5. Her fellow workers brought this to her supervisor's attention. Estimates

of the frequency and duration of the instances of her tardiness varied from witness to witness. According to some, she was, on average, 10 to 15 minutes late two or three times a week. According to others, she was late five to six times a week, on some occasions by 30 to 40 minutes.

5 - The complainant's supervisor, Jean Bernier, and the manager, Yves Ménard, raised this matter with her at the beginning of March 1990. Parking problems, particularly at noon hour, and confusion on her part over her claim that she could take the coffee breaks to which she was allegedly entitled onto her lunch hour were some of the reasons given by the complainant, during her discussion with Yves Ménard on March 9, 1991, to explain her tardiness. Much of the discussion that day was devoted to the decision made by the Toronto office on the review of the salary scale. In the complainant's case, this resulted in her still being paid less than she earned in her previous job. In any event, she decided following this meeting not to go home for lunch any more. Despite a definite improvement in the immediate aftermath, she again began returning late from lunch at the beginning of April.

6 - The complainant's supervisor, Jean Bernier, who had on previous occasions relied on reports he had received from her fellow workers, personally witnessed two instances of Ms. Arbour's tardiness, both of considerable length, during the week of April 23. On one occasion, he went down to the main floor at 8:30 a.m. to witness her arrival at work. At 9:10 a.m., as she had still not arrived, he asked one of Ms. Arbour's fellow workers, Shelly Stanley, to

inform him of her arrival, and then returned to his office on the 8th floor. Following these events, he planned to discuss her tardiness further with his boss, Yves Ménard, who was to return from holidays on April 30.

- 7 - The employer's allegations relate not only to her frequent tardiness, but also to her attitude and her lack of interest in the company. In support of these allegations, it cites three incidents that occurred on April 10 and 24, and May 1, 1990.

The first incident, on April 10, involved the complainant and one of the company's programmers, Paul Laroche, over the programming of a cellular telephone. Following the sale of one of these telephones, Louise Arbour went to the 8th floor to have it programmed. Paul Laroche was on the telephone and, after waiting for some time, a disgruntled Louise Arbour went back to her work area on the main floor and told Jean Bernier about her difficulties. In the meantime, the customer for whom the telephone was being programmed left. Later, Paul Laroche came downstairs to see the complainant and became upset at the turn of events. An exchange followed during which Louise Arbour used vulgar language and finally sent him packing.

- 8 - The April 24 incident occurred at the end of the day when Louise Arbour called the managers incompetent and the company "half-assed." She made these remarks to the supervisor of major accounts, Yves Martin-Leroux, who had come to close the office in Jean Bernier's absence and to enquire about business that day.

Jean Bernier, and Pascale Moreau and Shelly Stanley, both of whom worked with the complainant, were all away that day at a conference. Louise Arbour, along with Sylvain Bouchard and Daniel Davidson, two other employees in customer service, had to handle the workload alone. Following the exchange with Mr. Martin-Leroux, the latter invited the complainant to lunch the following day to discuss ways of improving the service. The two did in fact have lunch.

- 9 - Finally, on May 1, there was the "Tandy" incident, so called because it began over an alphanumeric programming terminal of that make. This piece of equipment is used to co-ordinate signals for customers with a large number of pagers. Louise Arbour was trying to obtain from the head of inventories, Jeff Brault, information for a customer who wanted to purchase this piece of equipment. When her efforts proved unsuccessful, she went to see the sales manager, Paul Lapointe, who was talking with Jean Bernier. After trying in vain to interrupt their conversation, she made her way to the elevator to return to her work area, ignoring her supervisor's orders not to leave. She was allegedly within earshot of the supervisor when he called out to her.

- 10 - As further evidence of the complainant's lack of interest in the company, she was actively seeking employment all the while being an employee of National Pagette. Louise Arbour had sent her résumé to another company in the Bell group, Bell Cellular, and in fact obtained an interview with the public relations manager, Marie Caron, on April 9, 1990, for the position of communications co-ordinator. Moreover,

Ms. Arbour allegedly told Yves Martin-Leroux, during their lunch on April 25, of her intention to look elsewhere, believing that her present duties did not meet her expectations.

- 11 - The decision to dismiss the complainant was taken on the afternoon of May 1 in the following circumstances. On April 30, Jean Bernier informed Yves Ménard, who was back from holidays, of Louise Arbour's frequent tardiness and bad attitude, and of the need to take a serious look at the situation since her probationary period was nearing its end. The Tandy incident precipitated events: the decision to dismiss her was taken that very afternoon. The following day, they agreed to review the situation. On May 3, Jean Bernier wrote a memorandum to Louise Arbour informing her that her file was being reviewed (Exhibit no. 22). The memorandum was apparently never sent because, in the meantime, the complainant suffered an accident and was unable to report for work on May 2 and the following days.
- 12 - On May 4, a friend of the complainant came to pick up Louise Arbour's pay and presented a doctor's certificate confirming that she was incapable of reporting for work. Ms. Arbour had still not contacted her supervisor. The dismissal memorandum was written that day and delivered to the complainant by messenger on May 7.
- 13 - Louise Arbour's union activities, notably the fact that she had signed a union membership card on April 26, were totally unknown not only to the company, but also to her fellow workers. A fellow worker and friend of

the complainant, Sylvain Bouchard, testified that she did not tell him about joining the union until some two weeks later. The company's general reaction to the filing of the complaint was one of surprise because her fellow workers testified that they knew nothing of her union activities. Moreover, these same fellow workers stated, in reply to counsel for the complainant, that they did not know the reasons why the complainant was dismissed, none of them having linked the decision with her alleged tardiness.

The complainant, for her part, presented the following evidence and arguments.

- 1 - According to the complainant's witnesses, there were no strict practices and formal schedules governing hours of work and the rotation of duties between customer sales and service functions at National Pagette. Their testimony in this regard merely corroborated what the employer's witnesses essentially said about this matter. There was considerable flexibility in the assigning of duties (in particular between sales and service) and the scheduling of hours of work, especially with regard to lunch hours.
- 2 - Information on the alleged instances of tardiness by Louise Arbour came almost entirely from Pascale Moreau, a fellow worker of Ms. Arbour who, according to several witnesses, disliked the complainant intensely. The testimony of other fellow workers concerning her tardiness largely reflected, and was based on Pascale Moreau's observations on the subject.

- 3 - Louise Arbour did not deny that the question of tardiness was discussed with Messrs. Bernier and Ménard, but there was nothing in the tone and circumstances of these discussions that might point to a serious problem. The complainant testified that management recognized that the lack of parking in the vicinity of the work place posed a problem. However, her decision to stop going home for lunch resolved this matter. She nevertheless admitted being late on one occasion in the morning and twice at noon hour, at most.
- 4 - The allegation that she made vulgar remarks to Paul Laroche during the incident on April 10 was exaggerated, and did not take into account the fact that her remarks were in response to his: he had called her a "stupid idiot" and accused her of trying to "rat" on him. Ms. Arbour testified that Paul Laroche came and apologized later. They both apologized to one another and made peace.
- 5 - As for the incident on April 24, Louise Arbour admitted criticizing various practices of the company, but in circumstances very different from those alleged. The conversation took place at the end of the day, when Ms. Arbour and two of her fellow workers had had to assume a heavier than normal work-load owing to the absence of two other fellow workers, Shelly Stanley and Pascale Moreau, who, along with the supervisor, Jean Bernier, were away at a conference. Her remarks were in response to acting supervisor Yves Martin-Leroux's query about business that day. There was nothing excessive in the tone and content of her remarks, as

evidenced by the supervisor's invitation to her to have lunch the following day.

- 6 - With regard to the Tandy incident, Louise Arbour was exasperated because no one could provide her with information on the company policy on this matter, a subject not covered in the initial training program. If she did not respond to her supervisor's order not to leave, it was simply because she did not hear it.
- 7 - Regarding her accident, Louise Arbour took adequate steps to notify her supervisor. A receptionist, Nicole Benoît, testified that on the morning of May 2, the complainant had telephoned and asked her to give her supervisor a message. He was asked to communicate with her by leaving a message on her answering machine since she was staying at a friend's for a few days. Mr. Bernier did not call, nor leave a message. As for her medical certificate, she transmitted it to the company on Friday, May 4, 1990, through a friend.
- 8 - The complainant signed a membership card in the union on April 26, 1990 in the following circumstances. She was to meet for lunch in the park near her office with Louise Lachance, a programmer at National Pagette, and Chantal Desmarteaux, a former employee of National Pagette and recognized union organizer. Ms. Lachance had arranged the meeting. On their way back from the park, the group ran into Brenda Parisée, whose work station was on the 8th floor where the company's administrative offices, and in particular the supervisors' offices, are located.

9 - Louise Arbour testified that she never lacked interest in the company. On the contrary. Testimony from fellow workers such as Sylvain Bouchard and Daniel Davidson, and her monthly sales reports, indicated that she did her job quite adequately. She pointed out that on several occasions she made practical suggestions to improve operations. One of her suggestions, the preparation and posting of work schedules, was even implemented by her supervisor at the beginning of April.

10 - For a clear understanding of the intent and purpose of the actions taken by the employer against the complainant, it must be remembered that these actions occurred during a difficult union organizing campaign. The employees were very conscious of the employer's hostility to the possible establishment of a union. This fact accounts for the lack of specifics provided by Louise Lachance on the circumstances of the organizing of the meeting of April 27 at which Louise Arbour signed a union membership card.

Finally, a word on an objection raised by the complainant during the proceedings. The objection, which the Board took under advisement, concerns the precise rules of rebuttal evidence in cases, such as the present one, where there is a reverse onus of proof. Counsel for the complainant argued that the respondent could not be given carte blanche, in these circumstances and at this stage of the proceedings, to call witnesses to inform the Board of facts of which it was aware during case in chief. The employer called two witnesses in rebuttal: (a) Paul Lapointe, sales manager, who was questioned about the Tandy incident, and (b)

Marie Caron, public relations manager at Bell Cellular, who confirmed interviewing the complainant for a position.

The Board dismissed the objection. In the case of Ms. Caron's testimony, its purpose was to verify the complainant's credibility on a point in her own testimony. In the case of Mr. Lapointe, who did not testify during case in chief, the questions concerned specific points in Ms. Arbour's testimony and were not intended to "recast" the evidence to strengthen the employer's case. The complainant had every opportunity to cross-examine witnesses and ask additional questions. On the general significance of the objection, the Board is mindful of its own rule set forth in Royal Bank of Canada, Jonquière and Kénogami (1980), 42 di 125 (CLRB no. 279):

"[The Board wants] to learn all the facts as expeditiously as possible, regardless of how they arrive on the record, provided that this method does not deprive the opposing party from learning them, challenging them, refuting them or adding to them through cross-examination and rebutting evidence."

(page 151)

Having said this, the Board deems it important to point out that, in certain unfair labour practice cases, where "the written complaint is itself evidence [of a] failure" to comply with section 94(3), this statement must not be construed so as to lessen the obligation placed on the employer to prove that the action taken was not motivated in any way by anti-union animus. In order to discharge this burden, the employer must present the most complete evidence possible of the reasons for the action in question, and not try and "keep in reserve" evidence for presentation during rebuttal. The Board will have to decide, in each case, whether it is appropriate to admit as rebuttal evidence information previously available.

III

Analysis

When the Board examines the merits of an unfair labour practice complaint, particularly one involving dismissal, its role is very different from that of an arbitrator. The reasons for the decision to dismiss an employee are relevant only insofar as they reveal, through their nature, their occurrence in time, their severity or their impact, that the decision was motivated by anti-union animus. In discharging the reverse onus of proof imposed in section 98(4) of the Code, the employer must show that its reasons for dismissing an employee are in no way motivated by anti-union animus. Past Board decisions dealing with this subject are as abundant as they are unequivocal. It is appropriate to quote in extenso the following excerpt from Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):

"The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

'... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section

184(3), he will be found to have committed an unfair labour practice.'

(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461; emphasis added)"

(pages 34-35; and 14,007; emphasis added)

In addition to this decision, see also Larose-Paquette Autobus Inc. (1990), as yet unreported CLRB decision no. 840, for other relevant references.

The framework for examining evidence presented by either party is therefore clear. The central question to be answered here is whether, based on the documentary and oral evidence, the reasons stated by the employer in its dismissal memo to Louise Arbour are absolutely the only reasons that entered into its decision, notwithstanding the question of whether they are, otherwise, legitimate and valid.

From this perspective, what precisely are the criticisms the employer makes against Louise Arbour? The dismissal memo of May 7, 1990, cited earlier, lists the following reasons: a lack of improvement in her late arrivals in the morning and in her returning to work late following her lunch hour; her lack of interest and motivation and her difficulties adjusting to teamwork; and finally, her actions on May 1 (the Tandy incident), in particular her failure to inform her supervisor of the reasons for her absence.

The Board examined in detail the particular circumstances of these failings and events in the light of all the evidence presented. The following analysis reviews this evidence having regard to the reasons given for the dismissal.

(a) Tardiness

The Board heard testimony from numerous witnesses concerning the complainant's lack of punctuality. As we saw earlier, there is a wide difference of opinion among these witnesses as to the number of instances of tardiness and their duration. The general impression that emerges from all this testimony remains, insofar as the Board is concerned, one of great confusion. Two factors account for this confusion.

First, the vast majority of the information on the complainant's alleged tardiness came from a fellow worker, Pascale Moreau, whose dislike of the complainant was well known. It is significant that in answer to questions from counsel for the complainant concerning the specific circumstances of these instances of tardiness, the majority of the complainant's other fellow workers remained very evasive, often ending their answers with such expressions as "that's what was said" or "people were talking about it."

Second, the evidence before the Board clearly establishes that there was no posting and strict observance of hours of work and the rotation of duties that determine the hours specific to each individual. For example, even during the month of April, the newly instituted schedules were often changed at the last minute by the supervisor, owing in particular to the request for leave or personal considerations.

The Board noted supervisor Jean Bernier's statement that the situation deteriorated during April. It

therefore paid particular attention to the end of the period of employment, i.e. the period preceding the point at which Jean Bernier decided to raise the matter with director Yves Ménard when the latter returned from holidays on April 30. The testimony heard concerning Louise Arbour's tardiness during the weeks of April 16, 23 and 30, 1990 does not indicate any deterioration. Shelly Stanley acknowledged that there were fewer instances of tardiness than usual on the part of the complainant and that when asked by Jean Bernier to monitor the complainant's punctuality for him, she had reported two absences. However, she admitted that there had been many changes to hours of work. Sylvain Boucher, for his part, testified that he did not recall whether she was late during this period, but admitted that he personally had eaten lunch with the complainant in the park three times toward the end of April and stated categorically that each time, they returned to work on time. Messrs. Kateb and Davidson made no mention of frequent and lengthy tardiness. In short, there is very little clear evidence to support supervisor Bernier's claim that the situation had deteriorated, thereby warranting his raising it with his director immediately upon the latter's return to work.

Moreover, even if we assume that the complainant's record of tardiness is lengthy, a conclusion that is not supported by the confusing testimony on this point, the vigor, or rather lack of vigor, with which the employer responded to these failings is telling. When this matter was first raised with them, neither Mr. Bernier nor Mr. Ménard could say that they dealt with it in a manner that would have clearly conveyed

to the complainant the seriousness of the problem. For example, Yves Ménard testified that he devoted not much time discussing Ms. Arbour's tardiness with her at the meeting on March 9. Jean Bernier acknowledged that, when he discussed the matter with her a second time, he did not raise, either directly or indirectly, the possibility of her losing her job. Given all these facts, the Board therefore concludes that the instances of the complainant's tardiness, while undoubtedly more numerous than she is prepared to admit, were not nearly so numerous or serious as they were quite suddenly made out to be at the end of April, particularly in the absence of any systematic and objective way of monitoring the hours each employee supposedly worked. In failing to react more quickly and vigorously when these offences allegedly occurred, the employer was probably of the same opinion.

- (b) The lack of interest and motivation and the difficulties of adapting to teamwork

The Board heard testimony from a number of the complainant's fellow workers concerning her working relations with them. Not one mentioned any particular difficulties that she would have had fitting in, apart from the tension between her and Pascale Moreau. Whether it be Sylvain Bouchard, Christian Kateb or Daniel Davidson, or even Shelly Stanley who is a friend of Pascale Moreau, they all admitted that they got along well with Ms. Arbour. Daniel Davidson, for his part, stressed that the help he received from the complainant when he began working in customer service was very useful and much appreciated.

Moreover, the testimony of another supervisor, Yves Martin-Leroux, clearly reveals that the complainant was in fact keenly interested in the way the company operated, even if this interest was often expressed through rather sharp criticism of certain existing practices. What other conclusion could one reach since he invited her to lunch on April 24, the very day of the incident during which she is said to have criticized the company in particularly strong language. This lunch with the complainant merely serves to indicate, whatever criticism one might have of her on other counts, that the complainant showed enough interest in the company, and vice versa, to warrant this invitation. At the very least, it is clear that on April 25, the complainant was not an employee whom the company was preparing to dismiss; on the contrary, the entire discussion during the meal was devoted to the company, its practices and the realities of managing a customer service.

In his account of this meeting, Mr. Martin-Leroux pointed out that the complainant expressed to him her disappointment concerning her initial expectations and hence her wish to find other employment. The testimony of Ms. Caron of Bell Cellular, reported earlier, confirms that she took at least one step in this direction because the interview was held on April 9, 1990. When she testified, Ms. Arbour denied having this interview. In assessing this piece of evidence, the Board notes the inconsistency in this part of the complainant's testimony; it does not, however, draw the same conclusion as the employer drew, i.e. that the complainant showed no interest in the company. That someone would be on the look-out for

more attractive employment offers elsewhere while attending adequately to her existing duties is in no way blatant evidence of a lack of interest worthy of dismissal. This is especially true in the instant case where the review in March of the salary scale, which was mentioned by the employer when the complainant was hired, resulted in the complainant being paid considerably less than she was paid by her previous employer in Trois-Rivières. Looking for another job is not in itself significant unless, of course, it is clearly related to an unsatisfactory performance in one's present position. Nothing in the testimony heard by the Board would warrant making such a connection. The testimony given by her fellow workers, as well as Louise Arbour's sales reports, indicate that her job performance was satisfactory, and the employer gave her no clear indication that would lead her to believe otherwise.

Finally, the Board wishes to comment on the complainant's impulsiveness which, according to the employer, accounts for the vulgar remarks she made to Paul Laroche, in particular during the April 10 incident. Having observed the complainant throughout her lengthy testimony, the Board noted that she is a person who has strong reactions. However, the fact that Mr. Laroche apologized to Ms. Arbour, something unchallenged by the employer - let us note that Mr. Laroche did not testify for the employer - significantly dampens the impact of any general judgment one might make regarding the complainant's tendency to verbal excess.

(c) The actions of the week of May 1

Two acts of misconduct are alleged here: (i) Louise Arbour's refusal to obey the order from her supervisor on May 1 not to leave following the Tandy incident; and (ii) her failure to contact her supervisor in connection with her accident and her subsequent absences from work on May 2, 3 and 4. In the case of the Tandy incident, what the employer characterized as the excessive and insubordinate behaviour displayed by the complainant is largely mitigated by the circumstances of this incident. If she became upset and impatient at not being able to obtain an answer to her problem, it was because a customer was waiting at the counter. The complainant being a person of strong emotions, the Board has no difficulty imagining her expressing her impatience by using language that in all likelihood was less than flattering to the company. Be that as it may, in the case of a service enterprise like National Pagette, it is difficult to characterize as totally reprehensible behaviour that is motivated primarily by the desire to serve a customer promptly. Undeniably, the complainant showed a lack of tact and discretion. However, she did not receive in this instance any oral or written reprimand from her supervisor. Mr. Bernier testified that he decided instead to initiate, that very afternoon, together with the manager, Yves Ménard, the dismissal procedure.

As for the allegation that the complainant failed in her duty to inform promptly her supervisor of her absences following her accident, the testimony of receptionist Nicole Benoît leaves no doubt that Ms. Arbour notified her supervisor of her condition

during the day on May 2 by leaving him a clear message: she was not at home and if he had to contact her, he should leave a message on her answering machine. Mr. Bernier tried once to reach the complainant, but did not see fit to leave a message. There is no need at this point to determine who should have telephoned whom, when and how. The Board would simply point out that it is incorrect to allege, as does the dismissal letter, that the complainant did not inform her supervisor of her absence. It is certainly fair to say that she could have tried harder to communicate directly with Jean Bernier; however, this comment also applies to the supervisor who was in fact preparing to impose the ultimate penalty of dismissal. The least that can be said is that the supervisor was in no hurry to gather all relevant information before making the final decision, even though he could readily contact the complainant.

IV

Decision

Having regard to the circumstances concerning the criticisms directed at the complainant as described in the preceding section, the specific requirement that the employer discharge the burden of proof, and the documentary and oral evidence as a whole, the Board makes the following findings.

1. The actions taken by National Pagette to rectify Ms. Arbour's alleged shortcomings in the performance of her duties are, generally speaking, either too timid or too vague to be totally convincing. If the complainant's tardiness and her impolite and disrespectful language were so serious, it is surprising that they

did not even warrant, if not a formal, then at least a very clear, reprimand from her supervisor. The nature and significance of the incidents described in the evidence presented in support of these claims are not such as to persuade the Board that the employer was justified in harboring serious doubts about Ms. Arbour's performance during her first two months on the job. Apparently the opposite was true. Under cross-examination, Jean Bernier admitted that, apart from her tardiness, the complainant "gave good service." And even on the question of her tardiness, it is significant to note, as counsel for the complainant pointed out, that not one of Ms. Arbour's fellow workers linked her dismissal with her frequent tardiness.

2. The coincidence of events is also troubling. Nothing in the conversation that took place between Louise Arbour and supervisor Yves Martin-Leroux indicates that the employer was dissatisfied with the complainant. On the contrary. She is not criticized for her tardiness, her language or her bad attitude. But lo and behold, on May 1, the Tandy incident became, to quote the words used by the customer service manager, Yves Ménard, "the straw that broke the camel's back." But what exactly are we talking about because, since April 25, there had been no further incidents, apart from Ms. Arbour's signing a union membership card on April 26? As for the instances of tardiness referred to by Jean Bernier to justify his meeting of April 30 with Yves Ménard, our earlier remarks indicate that they diminished during this period, if in fact they continued to occur. The same observation must also apply to Louise Arbour's attitude and her

difficulty adapting to teamwork. Nothing in the testimony given by her fellow workers, or in any discussion she had with her supervisor on the subject, supports this claim. This is, in all likelihood, an observation after the fact.

3. The employer's claims that it knew nothing of Ms. Arbour's union activities are not entirely convincing, given the other evidence examined earlier. It seems entirely plausible that her fellow workers may not have known of them, as they testified, if one considers that some of them were clearly afraid of their membership in the union becoming known. What is clear, however, is that everyone, or nearly everyone, knew that a union organizing campaign was in progress and that this initiative did not have the employer's blessing. It stands to reason, in this context, that when an employee who worked on the 8th floor, where the offices of management were located, came across the trio of Louise Arbour, Louise Lachance and Chantal Desmarteaux, the latter being clearly recognized as a union organizer, returning from the park, this news might very well not go unnoticed. Such an event would not in itself be significant were it not followed, as it was in this case, by actions on the part of the employer that give the distinct impression that it knew of this activity. How else can one explain the fact that events strangely began to accelerate around April 30 when too few facts appear to have warranted it? The complainant became a problem employee whose fate had to be decided as quickly as possible. Even the approach of the end of the probationary period cannot explain everything.

For all these reasons, the Board therefore believes that the employer failed to prove, having regard to the presumption established in section 98(4), that its reasons for dismissing the complainant were not devoid of anti-union animus. Accordingly, it allows the complaint and concludes that National Pagette contravened section 94(3)(a) of the Code.

V

Remedies

Section 99 stipulates the following:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(c) in respect of a failure to comply with paragraph 94(3)(a), (c) or (f), by order, require an employer to

(i) employ, continue to employ or permit to return to the duties of his employment any employee or other person whom the employer or any person acting on behalf of the employer has refused to employ or continue to employ, has suspended, transferred, laid off or otherwise discriminated against, or discharged for a reason that is prohibited by one of those paragraphs,

...

(iii) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by that failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer; ..."

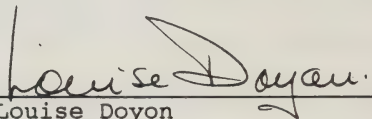
Pursuant to the remedial power described above, the Board therefore rescinds for all purposes the dismissal of May 7, 1990 and orders the employer to reinstate Louise Arbour and to compensate her for the salary and other benefits she lost as a result of her dismissal, minus any

amounts she received as income from employment during this period.

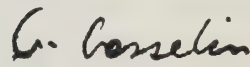
The Board reserves the right, under section 20(1) of the Code, to take any further remedial action that may prove necessary and also retains jurisdiction to settle any problem that might arise between the parties in implementing this decision.

Furthermore, the Board appoints Ms. Debra Robinson, Director of its Montréal office, or any officer Ms. Robinson might designate, to assist the parties in implementing this decision.

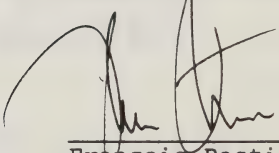
This is a unanimous decision.



Louise Doyon
Vice-Chair



Ginette Gosselin
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 26th day of March 1991.

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Summary

CLAUDIO RICCI, COMPLAINANT,
BROTHERHOOD OF RAILWAY CARMEN OF
CANADA, PETER FINNERTY AND TOM
WOOD, RESPONDENTS, AND VIA RAIL
CANADA INC., EMPLOYER.

Résumé de Décision

CLAUDIO RICCI, PLAIGNANT, LA
FRATERNITÉ DES WAGONNIERS DE
CHEMINS DE FER DU CANADA, PETER
FINNERTY ET TOM WOOD, INTIMÉS,
AINSI QUE VIA RAIL CANADA INC.,
EMPLOYEUR.

Board File: 745-3441

Dossier du Conseil: 745-3441

Decision No.: 863

No de Décision: 863

A local chairman for the
Brotherhood of Railway Carmen of
Canada delayed filing a grievance
for almost two months after an
employee was terminated by VIA Rail
Canada Inc. The grievance was
therefore rejected as untimely.

Le président d'une section locale
de la Fraternité des wagonniers de
chemins de fer du Canada a retardé
le dépôt d'un grief de près de deux
mois à la suite du congédiement
d'un employé par VIA Rail Canada
Inc. Le grief a donc été rejeté
parce qu'il avait été présenté hors
délai.

The employee complained to the
Board that the union had failed in
its duty of fair representation and
had breached section 37 of the
Canada Labour Code (Part I -
Industrial Relations).

L'employé a déposé auprès du
Conseil une plainte alléguant que
le syndicat avait manqué à son
devoir de représentation juste et
avait donc enfreint l'article 37 du
Code canadien du travail (Partie I
- Relations du travail).

The Board upheld the complaint,
waived any time limits and ordered
the union to take the grievance to
arbitration, to pay for counsel of
the employee's choice at
arbitration, to co-operate with
counsel in expediting arbitration
and to pay the cost of any
compensation for lost wages between
the termination and the date of
this decision, should the
arbitrator decide in favour of the
employee.

Le Conseil a maintenu la plainte, a
levé les délais prescrits et a
ordonné au syndicat de porter le
grief à l'arbitrage, de payer les
honoraires de l'avocat choisi par
l'employé, de collaborer avec
l'avocat de façon à accélérer le
processus d'arbitrage et
d'indemniser l'employé pour toute
perte de salaire entre le
congétiement et la présente
décision, si l'arbitre donnait gain
de cause à l'employé.



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No de tél.: (819) 956-4802
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Reasons for decision

Claudio Ricci,
complainant,
Brotherhood of Railway
Carmen of Canada,
Peter Finnerty and
Tom Wood,
respondents,
and
VIA Rail Canada Inc.,
employer.

Board File: 745-3441

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Calvin B. Davis and Evelyn Bourassa.

Appearances:

Paula M. McGirr, for the complainant, Claudio Ricci;
Steve Waller, for the respondents, Brotherhood of Railway
Carmen of Canada, Peter Finnerty and Tom Wood; and
Domenic Scalia, for the employer, VIA Rail Canada Inc.

These reasons for decision were written by Vice-Chairman Eberlee.

I

Claudio Ricci was a carman mechanic with VIA Rail in Toronto until his employment was terminated on July 13, 1988. Peter Finnerty, local chairman for the Brotherhood of Railway Carmen, did not file a grievance against the termination until September 13, 1988, which was well beyond the 30 days specified in the collective agreement within which a grievance must be filed. VIA Rail rejected the grievance at subsequent stages of the grievance procedure,

largely because it was alleged to be untimely, but ultimately also on the ground that it lacked merit.

In a letter dated September 13, 1989, Tom Wood, the union's system general chairman, advised Mr. Ricci that "we would not be proceeding to arbitration based on the information we have at hand." This had to do with the merits of the grievance in addition to "the time limit problem". Mr. Wood asked for additional evidence from the complainant. Mr. Ricci followed this up with new allegations concerning the reasons for his dismissal and then on November 16, 1989 filed a complaint with the Board alleging that the union was in violation of section 37 of the Canada Labour Code (Part I - Industrial Relations) in its handling of the matter.

Section 37 reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

A hearing was held in Toronto on September 24, 1990 and March 19 and 20, 1991.

II

In dealing with a complaint under section 37 that a union has represented an employee discriminatorily, arbitrarily or in bad faith in the handling of a grievance, the Board has no mandate to rule on the merits of the grievance itself. Thus, in the instant complaint, the Board's

examination will be directed, not at any question as to whether Mr. Ricci's termination was right or wrong, but at the way in which the union defended him. Naturally, it will be necessary to look at the whole situation and to describe the circumstances of the termination and to assess the union's reaction to those circumstances. But in the final analysis, if the Board feels that the union mishandled Mr. Ricci's case - contrary to section 37 - it will be up to an arbitrator to rule on the actual merits of the grievance that lies at the heart of the matter.

Mr. Ricci began working as a carman mechanic for VIA Rail on November 4, 1987. He had been employed in the same capacity for C.P. Rail from February 4, 1979 to September 26, 1986. While working for C.P. Rail, Mr. Ricci had a run-in with a fellow employee; this person brought charges against him under the union's constitution and he was expelled from the Brotherhood for one year. The affair made him unpopular with fellow employees and, because the workplace had become uncomfortable for him, he left C.P. Rail and obtained employment at VIA Rail.

The evidence before the Board shows that his colleagues at VIA Rail were aware of this situation at C.P. Rail and the reputation it had given him. Local chairman Finnerty told the Board he knew of the matter well before Mr. Ricci's dismissal. The Board was also told that some employees did not want to work in the same crew with Mr. Ricci. The Board considers it probable that his supervisors at VIA Rail knew the story, as well.

On November 20, 1987, only a few days after going to work for VIA, Mr. Ricci suffered a lower back injury and had to

go on workers' compensation. He was absent from work for most of the time until the end of May, 1988. On July 12, 1988, he had a recurrence of his back problem and was able to complete only about seven-eighths of the shift. He went to a chiropractor on July 13, who told him to stay off work for a period. Nevertheless, he went into work before the night shift started on July 13, intending to ask for light duties. The employer's response was to give him a letter, dated that day, advising him:

"Failure to successfully meet the requirements of your probationary period has resulted in your services as Carman at VIA Rail Canada's Toronto Maintenance Centre being terminated effective 13 July 1988."

The letter was signed by Archie Reid, Shop Foreman.

Mr. Ricci immediately grieved the termination to Mr. Reid and refused to sign the "termination clearance" document. He demanded to know what failure to meet the requirements of the probationary period meant, but received no answer that satisfied him.

The next day, Mr. Ricci spoke to Local Chairman Finnerty about grieving the termination. He also talked to the assistant local chairman who told him to present a written grievance.

Mr. Finnerty testified that, as local chairman, he was responsible for progressing grievances. He always wrote the grievance for the employee at Step 1 of the grievance procedure. He acknowledged that Mr. Ricci discussed the matter with him on July 14 and showed him the termination letter. He promised Mr. Ricci that he would investigate

to see whether he (Mr. Ricci), as a probationary employee, would actually have a grievance; whether the termination was disciplinary or not. He had never before handled a case involving the termination of a probationary employee.

The next day, Mr. Finnerty was due to go on holidays, so he left matters in the hands of the assistant local chairman. Meanwhile, Mr. Ricci wrote up a lengthy and detailed account of the situation, dated it July 28, 1988, and gave it to the assistant local chairman as the basis for the preparation of a written grievance at Step 1 of the grievance procedure.

Under the provisions of the collective agreement then in effect between the Brotherhood and VIA Rail, an employee must at Step 1 first raise the grievance orally or in writing with his or her immediate supervisor. (Mr. Ricci did this with Mr. Reid who signed the termination letter.) The employee is then expected to present a grievance in writing to the local chairman within 10 days of receiving the supervisor's decision. The Board does not consider that Mr. Ricci's case was impaired or invalidated because he presented his grievance in writing to the assistant local chairman (who was substituting for the vacationing local chairman) some 14 or 15 days after he received the termination letter and protested it to Mr. Reid. He did, after all, raise the matter immediately, if only verbally, with Local Chairman Finnerty on the day following the receipt of the termination letter.

In any event, Mr. Ricci made clear what his grievance was in his written account dated July 28, 1988. Step 1 of the grievance procedure gives the local chairman 30 days from

the "cause of the grievance" within which to file a written grievance with the company. Mr. Finnerty did not meet this deadline.

He told the Board that he returned from holidays at the beginning of August. There was still no further information from the company as to why Mr. Ricci had been dismissed. He approached several supervisory and management persons who were not forthcoming. Various persons told him they had not made evaluation reports on Mr. Ricci. On August 20, which was well beyond the 30-day time limit, he talked to B. Scannell, the Manager of Operations, who told him to put things in writing. He told the Board that Mr. Scannell also said the time limit would not be a problem. Throughout this period, Mr. Ricci and Mr. Finnerty had several conversations.

Mr. Finnerty testified that he did not file the grievance within 30 days because he wanted to be sure there was in fact a grievance. Moreover, company people had assured him time limits would not be a problem. He felt, in any event, that the 30 days would begin to run only from the point at which he received information from the employer as to why Mr. Ricci had been released.

Finally, in a letter to Mr. Scannell, the Manager of Operations - 11 days after Mr. Scannell told him to put it in writing - he asked for the "why" of the termination. On September 6, the General Foreman, R.D. McClelland, replied on Mr. Scannell's behalf:

"Mr. C. Ricci was on probation and in the course of his employment with VIA Rail it was found that his performances on the job did not show enough initiative and over-all performance was poor."

Still Mr. Finnerty didn't act on Mr. Ricci's behalf. In fact, he did not file an actual grievance until September 13 and this was because General Chairman J.R. Moore-Gough instructed him to do so. Not surprisingly, the company rejected the grievance as untimely in a letter also signed by General Foreman McClelland, dated September 20, 1988.

Mr. Moore-Gough testified he recognized, as soon as the matter was brought to his attention, that the union had serious difficulties with the timeliness question. He told Mr. Finnerty to file the grievance and then they would try to find a way to overcome the fact that the 30-day limit had been exceeded. He testified that Mr. Finnerty did not mention to him at any time anything about having been assured by Mr. Scannell or other management people that he did not need to worry about time limits - that there would be no problem raised by the company in that connection. To Mr. Moore-Gough, the problem with the grievance then and at succeeding steps was always clear: it had not been filed when it should have been.

According to Mr. Moore-Gough, Local Chairman Finnerty told him that he had not filed the grievance within the required 30 days because he had not been able to determine the reason for the termination and also partly because he had gone on vacation for two weeks. Mr. Moore-Gough said his practice had always been to obtain in writing any agreement by the company on a time extension.

The company's rejection of the September 13, 1988 grievance was followed up on September 29, 1988 by a letter from Mr. Moore-Gough which constituted the Step II

appeal under the grievance procedure. Mr. Moore-Gough sought to overcome the timeliness problem, as well as to argue the merits of Mr. Ricci's grievance. The company replied by rejecting the grievance at Step II on the basis of a somewhat expanded analysis of the timeliness question.

On November 3, 1988, System General Chairman Tom Wood addressed a Step III appeal to the company, providing arguments directed at other aspects of the termination in addition to the timeliness issue. This appeal was rejected by VIA Rail's Manager of Labour Relations in a letter dated January 12, 1989. This official declined the grievance "on the basis of violation of time limits", but he went on to set out in considerable detail why he felt the termination was justified on the merits.

The matter went on to Step IV and at this point there was discussion about settling the grievance if VIA Rail would take Mr. Ricci back as a new hire. In the end, the company rejected this proposition. The evidence also reveals that Mr. Ricci continued to believe, or, more accurately, continued to be led to believe, that his case was in hand and the prospects were not altogether dismal, in spite of problems like the timeliness one.

However, on September 13, 1989, Mr. Wood wrote the letter already referred to in these reasons, in which he made clear to Mr. Ricci that he did not think he had much of a case for arbitration. Mr. Wood said, for example:

"There are some serious weaknesses in your case should we decide to go to arbitration. I had pointed out to you on previous telephone conversations that your grievance could be untimely. Regardless of the time limit problem, your case has to be also judged on the merits of the evaluation carried out during your probationary period. I am sure you will agree your evaluation report is less than adequate for a probationary employee. The Corporation will really make a case out of your absence for the period between April 13, 1988 and May 31, 1988."

Mr. Wood took considerable care in the letter to outline his understanding of arbitral jurisprudence concerning the termination of probationary employees. He went on to suggest that in order for the Brotherhood to take Mr. Ricci's case to arbitration, it would have to prove, among other things, that the supervisor who evaluated him rated him poorly, acting in bad faith and for reasons unconnected to his performance. "As stated earlier you were evaluated on your overall work performance. In order for us to prove discrimination we would need legitimate proof of same. At this point in time I don't have such proof and you have not provided me with any."

Mr. Wood went on to say, "In view of all of the above we would not be proceeding to arbitration based on the information we have at hand..."

Mr. Ricci reacted first by immediately writing a lengthy letter to Mr. Wood detailing the problem he had had with the Brotherhood at C.P. Rail and asserting that his treatment at VIA Rail had flowed from that situation. Then, on or about November 16, 1989, he filed this complaint.

The question has arisen as to whether the complaint itself is timely. Was it filed, as required by section 97(2) of the Code, "not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint?" In the Board's opinion, Mr. Wood's letter of September 13, 1989, with the parts we have already underlined, could quite reasonably be interpreted by Mr. Ricci as signalling that his grievance was close to the end of the road as far as the union was concerned, because of the timeliness problem, as well as on account of the merits of the grievance itself. Up to this time, in the Board's opinion, he was encouraged by the union to believe that something could be done for him that would overcome the problem of his grievance having been filed too late by the union. In the Board's opinion, he did not actually know until he received and digested Mr. Wood's news of September 13, 1989 that the union was probably going to abandon him.

On the one hand, the union has argued that he should have complained earlier. And in the next breath it has claimed to the Board that he filed the complaint prematurely, in that the union officially notified VIA Rail on November 1, 1989 of its intention to go to arbitration and didn't decide not to go to arbitration until much later, apparently in March, 1990. His filing of the instant complaint was done within 90 days of his receiving Mr. Wood's advice that the union wasn't going to arbitration with the case it had in hand at that point. This was the first time the union had put its position to Mr. Ricci in this way. No doubt, if for no other reason, he filed the complaint out of sheer caution, as an insurance policy, so

as not to be caught in the bind of untimeliness again. It certainly was not filed too late. If, as the union suggested it was filed too soon, this would not have mattered had there been a settlement satisfactory to Mr. Ricci. The Board finds the complaint to be timely.

III

Had it not been for the failure of Mr. Finnerty to file the grievance in a timely fashion at Step I, the Board might well have concluded that Messrs. Moore-Gough and Wood represented Mr. Ricci in an exemplary fashion, at least up to the point where the union's Joint Protective Board decided to drop the grievance on its merits. It is obvious in hindsight, however, that the efforts of Messrs. Moore-Gough and Wood were doomed because of what Mr. Finnerty had done or not done. It is also obvious to the Board, that the basic reason Mr. Ricci's grievance did not proceed to arbitration was that it had not been filed in a timely fashion. The union's decision in early 1990 to drop the grievance on its merits - a decision taken some months after Mr. Ricci filed his complaint with the Board - may or may not have been taken primarily to obscure the union's fundamental default in the matter. For the Board, the significant feature of the whole situation, upon which the examination must be focused, is the Step I conduct of the union. The failure of the union to file the grievance within the Step I time limit so that the employer would have to consider it on its merits and so that an arbitrator could ultimately have jurisdiction to adjudicate it, is the point around which Mr. Ricci's case revolves.

In some previous cases - Brenda Haley (1980), 41 di 295, [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB No. 271); Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB No. 304); Don Greenwood et al, (1990), 90 CLLC 16,034 (CLRB No. 795); Dave Mullin, as yet unreported Board Decision No. 852 and Cathy Miller, as yet unreported Board Decision NO. 854 - the Board found in each case that a time limit in the grievance procedure was missed but that the fault was only simple negligence and not therefore a violation of section 37.

The facts in this case lead us to the conclusion that Mr. Finnerty's failure was a great deal more than an innocent mistake, constituting only simple negligence.

Mr. Finnerty seems to have been reluctant to file a grievance at all. It is apparent that Mr. Ricci made urgent representations to him immediately after receiving the termination letter. Mr. Finnerty could easily have filed a grievance immediately, if for no other reason than to preserve Mr. Ricci's rights. Such would have taken him only a few minutes plus the mental effort of composing two or three sentences. He testified to the Board that he had a reasonably good knowledge of the collective agreement and that, as the local chairman, one of his principal responsibilities was the handling of grievances. Meeting time limits is an important part of the handling of grievances. Undoubtedly he was aware of that fact and of the actual time limits within the Brotherhood/VIA Rail agreement. His on-going concern about being sure there was a grievance before filing anything seems misplaced. In the light of the fact that Mr. Ricci had been terminated, it should have been obvious to him that it was

quite in order at that time to file a grievance. Whether that grievance would ultimately stand up was not particularly relevant. He claimed he was assured by management that he need not worry about the 30-day time limit, yet he made no mention of this assurance to Mr. Moore-Gough when the latter instructed him to file a grievance and he did so two months after Mr. Ricci had been let go. In any event, a person of his experience in handling grievances would be bound to know that such an assurance ought to have been confirmed in writing.

The whole situation smacks of gross perfunctoriness. It strikes the Board that Mr. Finnerty actually did his best to avoid filing a grievance on Mr. Ricci's behalf. He knew about Mr. Ricci's troubled past at C.P. Rail; it is probable that this was an influence at work in motivating his conduct. He probably hoped Mr. Ricci would go away quietly.

The Board finds that the Brotherhood did violate section 37 of the Code through Mr. Finnerty's handling of the grievance against Mr. Ricci's termination. In order to remedy this contravention, the Board orders the Brotherhood of Railway Carmen of Canada to:


1. Take the grievance that was filed on or about September 13, 1988 to arbitration forthwith under the provisions of the prevailing collective agreement. For that purpose, the time limits in the collective agreement respecting the filing of grievances shall be waived;

2. pay the reasonable fees and costs of counsel selected by Mr. Ricci to assist him in taking the grievance to, and presenting his case at arbitration, should he desire such assistance. The Brotherhood shall co-operate with Mr. Ricci and his counsel in respect of the expeditious arbitration of the grievance;
3. bear the cost of any compensation which the arbitrator may determine should be paid to Mr. Ricci during the period between his termination and the date of this decision, should the arbitrator decide to award compensation for lost wages.

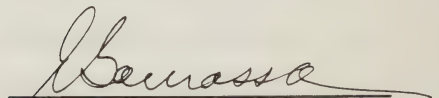
The Board appoints Peter Suchanek, Ontario Regional Director and Registrar, or a person designated by him, to assist the parties to implement the foregoing orders and will remain seized of the matter in order to deal with any question that may arise, including the making of specific orders if necessary.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Evelyn Bourassa
Member of the Board

DATED at Ottawa, this 27th day of March 1991.

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SUMMARY

Brad Murray, complainant, Voyageur Colonial Limited, employer/respondent, and Canadian Brotherhood of Railway, Transport and General Workers, certified bargaining agent.

Board File: 950-159

Decision No.: 864

RÉSUMÉ DE DÉCISION

Brad Murray, plaignant, Voyageur Colonial Limitée, employeur intimé, et la Fraternité canadienne des cheminots, employés des transports et autres ouvriers, agent négociateur accrédité.

Dossier du Conseil: 950-159

No de décision: 864

The decision concerns a complaint by Mr. Brad Murray, a motor coach operator, alleging that his employer, Voyageur Colonial, contravened section 147 of the Code (Part II - Occupational Safety and Health) by having disciplined him for refusing a driving assignment he claimed he was too fatigued to complete as assigned.

Having reviewed all the circumstances of the assignment and the refusal in some detail and following a partial review of applicable jurisprudence, the Board found that the complainant had neither exercised his right of refusal in a bona fide manner nor complied with the prerequisite requirements to the filing of such a complaint.

The complaint was dismissed.

La décision porte sur une plainte déposée par Brad Murray, un conducteur d'autocar, alléguant que son employeur, Voyageur Colonial Limitée, avait enfreint l'article 147 du Code canadien du travail (Partie II - Sécurité et santé au travail), lorsqu'il avait imposé au plaignant une mesure disciplinaire pour avoir refusé une affectation qu'il ne pouvait, selon lui, mener à bien en raison de fatigue extrême.

Après avoir revu en détail les circonstances reliées à l'affectation et au refus, et à la suite d'un examen partiel de la jurisprudence applicable, le Conseil a jugé que le plaignant n'avait ni exercé un droit de refus de bonne foi ni rempli les conditions préalables liées au dépôt d'une telle plainte.

La plainte a été rejetée.



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Reasons for decision

Brad Murray,
complainant,
Voyageur Colonial Limited,
employer/respondent,
Canadian Brotherhood of Railway,
Transport and General Workers,
certified bargaining agent.
Board File: 950-159

The Board was composed of Mr. Michael Eayrs, Member, sitting as a single member quorum pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. Brad Murray, complainant, for himself;
Ms. Heidi S. Levenson Polowin and Mr. C.T. Burke, for the employer.

I

This complaint under the safety and health provisions of the Code was filed with the Board on September 14, 1990. The complainant, Mr. Brad Murray, who is employed by Voyageur Colonial Limited (Voyageur) as a motor coach operator, alleges that he was disciplined contrary to section 147(a) of the Code because he had exercised his right to refuse to work on the grounds that danger existed to himself by reason of fatigue due to the extended hours he was being asked to drive. The actual refusal took place at the complainant's home base at Toronto on June 20, 1990 when he declined a dispatch to take a run from Toronto to Montreal. On that day, Mr. Murray, a motor coach operator who has

been employed by Voyageur since 1980, was working a shift commencing at 5:00 p.m. Mr. Murray is classified as a "spare operator" and has substantial seniority in that classification.

As explained to the Board, spare operators are called in to perform "known work" or, as in Mr. Murray's case on June 20, to be available for work which might, for various reasons, arise during the shift.

While the Board was provided with details of the various factors impacting on driver assignments, it needs, for purposes of these reasons and decision, concern itself only with the actual events which occurred following commencement of Mr. Murray's shift on June 20, 1990.

An operator named Villeneuve departed for Montreal at 5:15 p.m., leaving operators Murray, Hall and Brown on call (waiting in the drivers' room). Two more drivers, Messrs. Alkerton and Caton, were scheduled to commence a similar shift at 11:00 p.m. Operator Caton called Voyageur between 6:00 and 6:30 p.m. and "booked off tired". Operator Alkerton subsequently reported, as scheduled, at 11:00 p.m.

At approximately 6:30 p.m., Voyageur supervisor Gordon White telephoned the drivers' room and informed Mr. Brown that he required one operator to take an assignment at 8:00 p.m., one to take an assignment at 9:00 p.m. and a third to remain on call. Mr. White also asked Mr. Brown to remove operator Caton's name from the posted "spare control sheet" as he (Caton) had "booked off tired". Operator Brown took the 8:00 p.m. assignment and operator Hall took the 9:00 p.m.

assignment, leaving the complainant (Mr. Murray) on call and, at that time, unassigned. It is noted that Mr. Murray, by virtue of his seniority, could have taken either of the 8:00 p.m. or 9:00 p.m. assignments.

At 11:05 p.m. Mr. White telephoned Mr. Murray and asked him to take his meal break and then bring a coach to the terminal for a possible trip to Montreal.

Mr. Murray replied, in effect, that he was too tired to drive to Montreal but would drive as far as Kingston.

At 11:45 p.m., Mr. Murray reported to the terminal, with the motor coach, and was informed by his supervisor that he would be operating an "extra" trip to Montreal and that the trip would be a "by-pass" (no stop in Kingston).

During the ensuing dialogue, Mr. Murray reiterated his position several times; namely that he was too tired and considered it unsafe to drive to Montreal, but that he was willing and able to drive as far as Kingston. His supervisor continued to instruct Mr. Murray to load the coach and drive to Montreal. The dialogue concluded with the supervisor suspending Mr. Murray for refusing instructions.

It can be noted at this point that had he accepted the assignment of driving to Montreal, Mr. Murray's hours would not have exceeded the hour limitations imposed by either the Canada Motor Vehicle Operations Hours of Service Regulations pursuant to the Canada Labour Code or the limitations imposed by the applicable Collective Agreement. It can be further noted that there was uncontroverted evidence to the effect that Voyageur does have a policy whereby an operator can "book off

tired" if he or she feels too fatigued to accept an assignment. It was in fact the exercise of that policy by operator Caton on June 20 that contributed to the requirement for Mr. Murray to drive to Montreal.

On June 22, 1990 a "hearing" pursuant to article 10.3 of the collective agreement was held. That hearing was convened to deal with the matter of Mr. Murray's suspension and was attended by Mr. Murray; Mr. Paul Gould, Union representative; Mr. Gordon White, Operating supervisor; Mr. Vince LeCourt, Labour relations manager and Mr. John Van Der Meer, Operations manager. By letter dated June 25, 1990, Mr. Murray was informed by Voyageur of the results of his disciplinary hearing; namely that he was suspended without pay, for the three days, June 21, 22 and 23, 1990.

On June 25, 1990 Mr. Murray contacted Labour Canada and established a July 4th appointment with Mr. Robert Maklan, Labour Affairs Officer, at which he filed a report of the June 20 incident.

On June 28, 1990, following the advice of the Labour Affairs Officer, Mr. Murray filed a written report of the June 20 incident with the joint Occupational Health and Safety Committee and was advised that his case would be considered by that committee at its next scheduled meeting in late July.

On July 13, 1990 the CBRT appealed Mr. Murray's suspension and a Step III grievance meeting was held on August 14, 1990.

On August 16, 1990 Mr. Murray and Mr. Maklan met with

the Union and Voyageur to discuss the incident. On August 28, 1990, Voyageur responded to the Step III grievance meeting by reducing Mr. Murray's suspension from three days to one day.

On September 14, 1990 Mr. Murray filed the instant complaint with the Board. On September 24, 1990 Mr. Maklan issued a letter to the parties confirming his understanding of the meeting which took place on August 16, 1990. His letter stated in part:

"... Because the incident occurred some time before Labour Canada became involved in the affair, I cannot make a ruling on whether it was safe or unsafe for Mr. Murray to continue to work. In addition, because not all the facts involving Mr. Murray's actions or the actions of his supervisor on the evening of June 20, 1990 were brought to light, it was unclear whether Mr. Murray had 'reasonable cause to believe.' The consensus opinion at the meeting was that this issue will be dealt with through the grievance procedure outlined in the drivers collective agreement and/or a hearing of the Canada Labour Relations Board.

Voyageur Colonial's policy toward 'the right to refuse unsafe work' in general was discussed. According to statements made during the meeting by Mr. C.T. Burke, Director of Human Resources, Ontario for Voyageur Colonials [sic], any driver who feels that he should not be on the road should take himself out of service. This includes tiredness. As a result, in the past Voyageur Colonial has not taken disciplinary action against a driver who has booked off tired. ..."

We have included the lengthy chronology of events cited above because it goes to the determination of the basic question this Board must address; namely was the complainant disciplined for a genuine exercise of his right of refusal pursuant to Part II of the Code or was he disciplined for other reasons?

II

The right to refuse is contained in section 128(1) of the Code:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

- (a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*
- (b) a condition exists in any place that constitutes a danger to the employee,*

the employee may refuse to use or operate the machine or thing or to work in that place."

Certain restrictions have been built into the Code which restrict the right to refuse in certain situations aboard ships and aircraft and also where certain degrees of danger exist as an inherent condition in the employee's work. There is no need to refer further to these provisions as they have no relevance to this particular complaint.

When an employee does exercise the right to refuse, the circumstances giving rise to the refusal must be reported immediately to the employer and to a member of the health and safety committee or to a safety representative (section 128(6)). The purpose of this section is to provide a forum where the employee's concerns over danger can be investigated and, where necessary, steps can be taken to alleviate the danger (section 128(7)). If, after this stage has been completed, the employee still perceives danger, both the employee and the employer must notify a "safety

officer" of the circumstances and the safety officer is then required to immediately investigate the matter in the presence of the employer, the employee or the employee's representative (section 129(1)). The safety officer must then render a decision as to whether danger exists or does not exist. When the decision is negative, the employee no longer has the right to continue to refuse to work. Where the safety officer decides that danger does not exist, the employee may, within seven days, refer the matter to this Board which then sits in appeal from the safety officer's decision (section 129(2) through (5)).

To protect employees from recrimination by employers for having exercised their right to refuse, section 147(a) of the Code prohibits certain employer action:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

- (i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,*
- (ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or*
- (iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part;"*

If an employer acts contrary to section 147(a), the

employee can bring a complaint to the Board under section 133(1):

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention."

A complaint may not be brought to the Board, however, if the employee has not followed the afore-described procedures of notifying the employer and engaging in the ensuing investigation and, the notification of the circumstances to a safety officer if necessary. These restrictions are set out in section 133(3):

"133.(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint."

The Board recently summarized its approach to this type of complaint in David R. Holloway (1990), unreported CLRB decision no. 835:

"This Board has said that it is not unreasonable to be wrong where safety and health is concerned and that employees ought not to be discouraged from raising suspicions or fears about danger in the workplace by the imposition of a stringent burden upon them to show at a later date that their refusal was reasonable. Provided that such refusals are motivated by genuine safety concerns the Board has said that it will ensure that employees receive the full protection offered by Part II of the Code. See William Gallivan (1981), 45 di 180; [1982] 1 Can LRBR 241 (CLRB no. 332); David Pratt (1988), 73 di 218; 1 CLRBR (2d) 310 (CLRB no. 686); Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); and John Charters et al. (1989), 3 CLRBR (2d) 253 (CLRB no. 727).

In William Gallivan, *supra*, the Board said that where refusals coincide with other labour relations disputes particular attention would

be paid to the circumstances to ensure that the refusals were properly motivated by genuine safety concerns. The Board is of the view that the right to refuse under Part II of the Code should not be abused, nor should this right be used to bring longstanding disputes to a head."

(pages 3-4; emphasis added)

It was against the foregoing legislative and policy background that this complaint was heard at Toronto on December 4, 1990.

III

Having considered all of the facts and circumstances and having heard the submissions of the parties, the Board concludes that this complaint must fail because it is not convinced that the purported exercise of the complainant's right to refuse was genuine. It was mostly his own doing that he did not have an earlier assignment on June 20, 1990 and, when he eventually ran out of dispatch options he was stuck with the Montreal run late that evening. He obviously did not want to take that trip and the Board is satisfied that his claim to "anticipated" fatigue if he was forced to drive beyond Kingston was no more than an excuse to get out from the assignment. If his claim to fatigue was genuine, and he was acting in good faith under Part II of the Code, he should have insisted on an investigation by the employer at the time and then notified a safety officer of the circumstances if he was still convinced that danger existed. It was not until well after the fact that he contacted Labour Canada and then only after he had been suspended for three days. This type of belated attempt to seek the

protection of the Code is not what was intended.

It was not until June 25, 1990 that the complainant contacted Labour Canada. This delay of five days from the refusal is not what was meant by section 129(1) where a safety officer is to be notified forthwith. While we understand and appreciate why the Board said in William Gallivan, supra, that it would give a broad and unrestrictive interpretation to section 133(3) (then 96.1(3)) and that it would not be a bar to a complaint if the sequence of events were not exactly as those set out in section 128(6) or 129(1), there surely has to be, however, minimal compliance with these provisions which are a pre-requisite to the Board's jurisdiction to deal with a complaint. There are obvious reasons why these provisions are included in the Code and they cannot simply be ignored by prospective complainants. For example, the requirement that a safety officer be notified forthwith not only provides an opportunity for the resolution of the problem through third party involvement, it also provides some measure of protection to employees under Part II. Once such a notification has been made and a safety officer becomes involved, the refusal is then beyond any doubt, firmly ensconced within the scope of Part II of the Code and the possibility of an employer explaining away any disciplinary action which is later taken against the employee becomes less likely. The notification of a safety officer is therefore part and parcel of the protection afforded employees under Part II of the Code.

The circumstances of this complaint are not dissimilar to what was before the Board in Monica McHugh et al.

(1989), unreported CLRB decision no. 743. In that case, flight attendants who had sat around all day awaiting the arrival of their assigned aircraft became agitated over the possible length of their shift. They then walked off the aircraft just before departure time after having identified a number of what they described as safety defects. Dismissing the complaints by the flight attendants who were fired for their refusals to work, the Board said:

"It was not until they were advised of their rights by Labour Canada, where they went to complain about unjust dismissal, that the complainants made a serious issue about their safety concerns.

I wish to make it clearly understood that I am in no way condoning a 20-hour duty day nor am I inferring that working such long hours is not hazardous to one's health. Logic dictates that by today's standards it would no doubt be found to be most unacceptable, particularly in an industry such as the instant case where flight attendants are responsible for the safety of passengers thus requiring them to be alert at all times. I sympathize with the complainants on this problem but must stress that this issue is not before me. I am to determine if the complainants' refusal to work was based on their genuine concerns for safety at the time.

With all due respect, this is not the way to resolve the ongoing dispute between flight attendants and Bradley over flight delays and extended duty days. Hindsight use of the right to refuse under Section 128 is not the intended purpose of Part II. The safety provisions in the Code are intended to ensure that employers provide safe workplaces in terms of equipment and environment. The right to refuse is designed to be used in situations where employees are faced with immediate danger when injury is likely to occur right there and then if the danger is not removed."

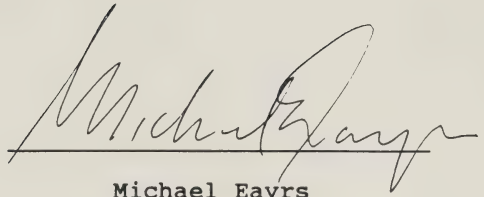
(page 15; emphasis added)

We agree with these statements and apply the same logic to the circumstances of this complaint.

While there was no conclusive evidence of an ongoing dispute over extended shifts here it was evident from his written pleadings that this is part of what was troubling Mr. Murray when he refused to accept the assignment. Further, there was uncontroverted evidence at the hearing that Mr. Murray, in the course of his disciplinary hearing stated that he was "trying to duck the assignment". We find that the refusal by Mr. Murray was not what he later attempted to make it out to be after he was dispatched and he had failed in his efforts to obtain a full reprieve from the discipline through the assistance of his bargaining agent. In other words, this refusal was not a bona fide refusal as contemplated by Part II, therefore, the protection offered by the Code is not applicable. The Board finds that the employer did not violate section 147(a) of the Code when it disciplined the complainant.

Furthermore, the complainant did not comply with section 129(1) of the Code in that he did not notify a safety officer forthwith as required which had the effect of eliminating the opportunity for the mandatory investigation by a safety officer. This failure has the effect of triggering section 133(3) of the Code which is a bar to the filing of the complaint.

For the foregoing reasons the complaint is hereby dismissed.

A handwritten signature in cursive script, reading "Michael Eayrs", written over a horizontal line.

Michael Eayrs
Member

DATED at Ottawa this 28th day of March, 1991.

CLRB/CCRT - 864

